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REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF IOWA.

BY JOHN S. RUNNELLS,
REPORTER.

VOL. VIII.
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" AUSTIN ADAMS, Dubuque.
" WILLIAM H. SEEVERS, Oskaloosa,
" JAMES G. DAY, Sidney, } Judges.

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REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA:

DES MOINES, DECEMBER TERM, A. D. 1876.

IN THE THIRTY-FIRST YEAR OF THE STATE.

PRESENT:

HON. WILLIAM H. SEEVERS, CHIEF JUSTICE.
" JAMES G. DAY,
" JAMES H. ROTHROCK, }
" JOSEPH M. BECK,
" AUSTIN ADAMS. } JUDGES.

THE STATE v. HAYDEN.

1. **Criminal Law: PRACTICE: CONTINUANCE.** The defendant is not entitled to a continuance for the reason that a witness examined before the grand jury, and subpoenaed by the State, is not in attendance at the trial.
2. **—: EVIDENCE: IMPEACHMENT.** The minutes of evidence given before the grand jury, or of that submitted upon preliminary examination, are not admissible upon the trial for the purpose of impeaching a witness.
3. **—: INDICTMENT: TWO OFFENSES.** An indictment charging the defendant with feloniously and burglariously breaking and entering a

45	11
78	295
45	11
81	147
45	11
83	116
45	11
86	552
45	11
95	489
45	11
96	283
96	306
45	11
105	45
105	680
45	11
108	912
45	11
109	626
109	742
45	11
115	117
45	11
116	205

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store with intent to commit larceny, and with stealing and carrying away certain articles therein contained, was *held* not liable to the objection that it charged two distinct offenses.

4. ——: ——: ——. At common law indictments for burglary and larceny in this form have been held not to be bad for duplicity.
5. ——: ACCOMPLICE. The fact that one has received stolen property, knowing the same to have been feloniously obtained, does not constitute him an accomplice in the burglary by which possession of the goods was acquired.
6. ——: REASONABLE DOUBT. Where the evidence is circumstantial, the jury need not be satisfied beyond a reasonable doubt of every link in the chain of circumstances necessary to establish defendant's guilt; it is a reasonable doubt of guilt arising from a consideration of all the evidence in the case which entitles the defendant to an acquittal.
7. ——: EXTENT OF PUNISHMENT. The crime of which defendant was convicted was the breaking and entering of a store, and stealing therefrom articles of the value of \$70; the defendant was a young man, and the circumstances of his offense and his subsequent conduct did not indicate him to be a hardened criminal: *Held*, that his term of punishment should be reduced from eight to three years.

Appeal from Clayton District Court.

THURSDAY, DECEMBER 7.

THE charging part of the indictment against defendant is in these words: "The said James Hayden, on or about the 10th day of March, 1875, at or about the hour of one o'clock in the night of the same day, with force and arms in the county aforesaid, one store building of Beckman Bros. there situated, wherein valuable merchandise was kept for sale and store, viz: pocket knives, razors and revolvers, of the value of \$100, feloniously and burglariously did break and enter into, with felonious intent, the goods and chattels of the said Beckman Bros., in the said store then and there being found, then and there feloniously and burglariously to steal, take, and carry away, *and seven dozen of pocket knives, three razors and two revolvers of the goods and chattels of the said Beckman Bros., and of the value of seventy dollars, in the said store building, and then and there feloniously, and burglariously did steal, take and carry away, contrary to the form of the statute in such case made and provided.*"

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There was trial by jury, a verdict of guilty and judgment thereon, and defendant appealed.

James O. Crosby, for appellant.

M. E. Cutts, Attorney General, for the State.

ROTHROCK, J.—I. After the jury was impaneled the defendant moved for a continuance upon an affidavit setting forth that one Nathan Ross was a material witness for him, that said Ross was used as a witness for the State in the preliminary examination and before the grand jury, his name being upon the indictment; that a subpoena was issued on the part of the State for said Ross, and delivered to the sheriff for service, that defendant supposed said Ross was in attendance at court until after the jury was impaneled, when he first learned that said witness had not been found. The motion was overruled and defendant excepted.

We think there was no error in this ruling of the court. If the defendant desired the attendance of the witness, due diligence would require that he should have had him subpoenaed in his behalf, or at least to have discovered that he was not in attendance at the court until after the jury was impaneled. The law gave him every facility necessary to secure the attendance of his witnesses, and he should not have relied on the efforts of those representing the State to aid him in that behalf.

II. On cross examination of certain witnesses for the State, their attention was called to the minutes of their testimony taken on the preliminary examination, and before the grand jury, with a view to an impeachment. At the proper time, counsel for defendant offered in evidence the minutes of the testimony of such witnesses taken before the grand jury for the purpose of impeaching them, by showing contradictory statements. Objection was made to the introduction of the minutes as incompetent and inadmissible, which was sustained. In the case of *The State v. Ostrander*, 18 Iowa, 435, it is held that the minutes taken before the grand jury are not admissible as *independent*

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evidence. The question as to whether such minutes could be used as impeaching evidence was not presented in that case. In the case of *The State v. Hull*, 26 Id., 292, and in *The State v. Collins*, 32 Id., 36, the question as to the admissibility of the testimony in the preliminary examination as impeaching evidence was expressly left undetermined. There is no doubt that letters previously written by a witness, depositions or affidavits made by him, or the like, may be introduced as impeaching evidence, after calling the attention of the witness to the supposed contradiction, that he may have an opportunity to explain if he so desires. *Morrison v. Myers & Turner*, 11 Iowa, 538; *Samuels v. Griffith*, 13 Id., 103; *Stephens v. The People*, 19 N. Y., 549.

But the minutes of a witness' testimony before a grand jury, and the substance of his testimony taken before an examining magistrate, are in no proper sense the writing or the act of the witness. It is the duty of the clerk of the grand jury to take and preserve the minutes of the proceedings, and of the evidence given before it. Code, Sec. 4275. The witness is in no way connected with the act of taking these minutes of his testimony, they are not required to be read over to him, nor to be signed by him. Unlike a deposition or affidavit, they do not purport to give statements of fact in full, but are what the law requires, mere "minutes." They are often taken down by persons wholly inexperienced in reducing the language of others to writing. A long experience upon the District Bench has enabled the writer hereof to observe that the evidence taken before grand juries is often of the most indefinite and uncertain character, and if used as the means of impeaching witnesses, would lead to the grossest injustice to witnesses, and tend to defeat a proper administration of justice.

What we have said in regard to the evidence taken before the grand jury applies with equal force to the evidence taken in a preliminary examination. Section 4241 of the Code requires the magistrate to write or cause to be written out the substance of the testimony only. It is not required to be read

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over to the witness, and is but the act of the magistrate or his clerk.

Excluding the written minutes or substance of the evidence from being introduced does not prevent an impeachment. The grand jury may be required by the court to disclose the testimony of a witness examined before them, for the purpose of ascertaining whether it is consistent with that given before the court. Code, Sec. 4285. An examining magistrate, or his clerk, or any person who heard the testimony, may be called for the same purpose. It appears that in this case the evidence taken before the grand jury was signed by the witness who was sought to be impeached. It does not, however, appear that the evidence was read over to him, or that he was otherwise made acquainted with its contents at the time of signature.

III. There was a motion in arrest of judgment, on the ground that the indictment charges the defendant with the ^{3. ——: in-} commission of two offenses. An examination of ^{indictment:two} offenses. the indictment will show that it contains all the necessary allegations to constitute the crime of breaking and entering a store building with intent to commit a public offense. Code, Sec. 3894. After alleging the intent to steal certain property, it is alleged that the defendant did steal, take and carry away certain goods, describing them.

The crime is designated in the indictment as burglary, and not as burglary and larceny. Whilst it is true that at common law, and under our Code, the felonious breaking of a store house is not technically burglary, yet the elements of the crime charged are the same as burglary, with the exception of the character of the building, and it must be assumed that the crime named in the indictment had reference to that of breaking and entering the store.

It is true that under the Code the indictment must charge but one offense, but it may be charged in different forms or counts to meet the testimony. Sec. 4300. Taking this whole indictment together, we do not believe it charges two offenses. The allegation that the defendant actually committed the crime of stealing the goods must rather be regarded as

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surplusage. It was a most important fact to show, as bearing upon the guilty intent with which the breaking and entering was done, and we regard it as no more than an allegation of evidence which may properly be rejected. It will be remembered that it was not claimed in the court below that the defendant was charged with larceny. The instructions of the court, the verdict of the jury, and the judgment, show that the crime for which the defendant was charged and tried was not larceny, but the breaking and entering the store with intent to commit larceny.

It never was permissible at common law to join two offenses in one count of an indictment, whatever the rule was as to ~~4. —: —:~~ allowing different offenses to be pleaded in separate counts, and yet it has been held that indictments for burglary substantially in the form of that under consideration were not bad for duplicity.

Com. v. Tuck, 20 Pick., 356; *State v. Brady*, 14 Vermont, 359; *Josslyn v. Com.*, 6 Metcalf, 236. In the last named case it is held that if the breaking and stealing are charged in one count, only one offense is charged, and the defendant on conviction can be sentenced to one penalty only.

IV. The principal witness upon the part of the State was one Mowry. He testified that the defendant confessed the ~~5. —: ac-~~ crime to him, and that after such confession he accomplice. received from the defendant some of the stolen property and concealed it. It was urged that he was an accomplice, and that under section 4559 of the Code the defendant could not be convicted without corroborating evidence. An instruction to the jury to this effect was asked, which was refused, and instructions were given that if Mowry took any part directly or indirectly in the commission of the burglary, he was what the law calls an accomplice; and that it was for the jury to determine from his admissions and all the evidence whether he was an accomplice; that the mere fact that Mowry received the stolen property knowing the same to have been stolen did not make him an accomplice. The jury was further properly instructed as to the necessity of

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corroboration, in case it should be found that Mowry was an accomplice.

We think there was no error in refusing the instruction asked, and in giving those above referred to. The thought of the instruction given is, that the guilty receiving of the goods did not make Mowry an accomplice. It may be conceded that the receiver of stolen goods is an accomplice in the simple larceny, being an accessory after the fact, and yet it by no means follows that he is an accomplice in breaking and entering a building with the guilty intent of committing a larceny.

V. The following instruction was asked in defendant's behalf, and refused:

"* * * * * As the evidence in the case is wholly circumstantial, you must be satisfied beyond a reasonable doubt of each necessary link in the chain of circumstances to establish the defendant's guilt."

The jury were instructed by the court as follows: "The defendant is presumed to be innocent of the crime charged until proved guilty beyond a reasonable doubt; and as the evidence in this case is circumstantial, it is your duty to give all the circumstances a careful and conscientious consideration; and if upon such consideration the minds of the jury are not firmly and abidingly satisfied of the defendant's guilt, if the conscientious judgment of the jurors wavers and oscillates, then the doubt of the defendant's guilt is reasonable, and you should acquit."

The instruction asked by defendant was properly refused, and that given by the court is correct. It is not a reasonable doubt of any one proposition of fact in the case which entitles to an acquittal. It is a reasonable doubt of guilt arising upon a consideration of all the evidence in the case.

VI. It is next urged that the evidence was insufficient to justify the verdict. In our opinion the verdict is fully sustained by the evidence. If the jury accepted the testimony of Mowry as true, the defendant is unquestionably guilty. It is proper also to say here that Mowry was in fact corroborated by other evidence as to the defendant's possession of the stolen property. The jury judged of the credibility of the witnesses,

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as was their province, whether wisely or not we are unable to determine.

VII. It is next and finally urged that the punishment inflicted upon the defendant is excessive. The sentence is ^{7. —————: ex-} imprisonment in the penitentiary for eight years. <sub>pun-
ishment.</sub> The defendant is a young man. The crime committed consisted in breaking a pane of glass and lowering a window, going into the store, and taking therefrom pocket knives, razors and revolvers, of the aggregate value of \$70. There is nothing in the manner of the crime itself, or in the character of the property stolen, or in the conduct of the defendant afterward, indicating that he is a hardened criminal. It is not like the case of a professional burglar or safe robber. Under all the circumstances, we incline to think the punishment too severe, and the judgment will be modified by reducing the term of imprisonment to three years.

With this modification, the judgment of the court below will be

AFFIRMED.

45	18
490	208
45	18
92	388
45	18
94	50
45	18
100	130
45	18
103	472

PECK v. MCKEAN.

1. Evidence: ADMINISTRATOR: SERVICES. In an action against an administrator to recover upon an implied contract for services rendered the deceased, the plaintiff cannot be permitted to testify to the facts which would raise an implied promise.
2. —————: OBJECTION: GROUNDS OF. When objection is made to the admission of evidence the grounds of objection must be stated, or the ruling will not be reviewed on appeal.

Appeal from the Linn Circuit Court.

THURSDAY, DECEMBER 7.

PLAINTIFF filed in the Circuit Court a claim against the estate of which defendant is executor, based upon an account for personal services rendered by her to the deceased in his lifetime. The defendant denied the claim, and the issue joined

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thereon was submitted to a jury, and a verdict and judgment had for defendant. Plaintiff appeals.

Thompson & Davis, for appellant.

J. B. Young, for appellee.

BECK, J.—The only question presented for our consideration in this case involves the correctness of the court's rulings upon the admissibility of evidence, and the sufficiency of the evidence to support the verdict. They demand only brief consideration.

I. The plaintiff offered her own evidence in the case to show the work done by her for the deceased, and its character.

1. EVIDENCE: The evidence was rejected, of which plaintiff now complains.

No express contract was shown between plaintiff and deceased. The estate is liable, if at all, upon an implied contract. Such a contract may be established by showing the amount and character of the work done with the knowledge and assent of the deceased, its value, etc. The evidence offered by plaintiff was intended to establish an implied contract, and thus fix defendant's liability. This contract, if established, would be based upon the personal relations and transactions between the parties. The performance of the labor by plaintiff, assent thereto, or other facts which would raise an implied promise of deceased to pay for it, would amount to a personal transaction between them. But a party to an action cannot be permitted to give evidence in order to establish such a transaction, when the adverse party is an administrator, executor or heir at law. Code, Sec. 3639. The evidence was properly excluded.

For the same reason the court properly excluded plaintiff's evidence establishing the non-payment of money advanced by her on account of the deceased, which was a part of the claim in the case.

II. The defendant was permitted to read in evidence a

The State v. Lewis.

clause of the will of deceased, and an account filed against the estate by the sister of plaintiff for services similar to those charged in plaintiff's account. Two witnesses were permitted to testify that "from appearances they judged" plaintiff was living as one of the family of deceased, at the time she performed the services charged in her account. When the evidence was offered plaintiff objected to its introduction, but assigned no ground for the objection. When exceptions are taken to the admission or exclusion of evidence, the grounds of objection must be stated, otherwise the ruling cannot be reviewed here. Code, Sec. 2832. It is difficult to see any sufficient support for the court's rulings, but in obedience to this statute we must refrain from an attempt to correct the error therein, if there be any.

III. It is insisted that the evidence fails to support the verdict. The evidence is contradictory, and the preponderance may be in favor of plaintiff, but there is no such absence of proof on the side of defendant as to authorize the inference that the verdict was not the result of an intelligent and unbiased exercise of discretion on the part of the jury. We cannot, therefore, disturb the judgment.

AFFIRMED.

THE STATE v. LEWIS.

1. **Criminal Law: EVIDENCE: INTENT.** The guilty intent of a party may be shown by his acts, conduct and declarations after, as well as before and at the time of, the commission of the criminal act.
2. **—: —: ADMISSIONS.** When the admissions of the defendant are supported by circumstances, a fact which constitutes but one ingredient of the crime may be established thereby.

Appeal from Pottawattamie District Court.

THURSDAY, DECEMBER 7.

THE defendant was indicted, tried and convicted for obtaining money under false pretenses, and he appeals.

The State v. Lewis.

John H. Keatly, for appellant.

M. E. Cutts, Attorney General, for the State.

ROTHROCK, J.—I. The alleged crime consisted in the defendant falsely and fraudulently representing and pretending to one N. J. Bond that he had purchased certain hogs, and thereby inducing said Bond to pay him \$80 in money. N. J. Bond was the only witness examined on the trial. It is not necessary to set out his testimony here. It is sufficient to say that it appears therefrom that he paid the defendant \$80, and gave him a letter of credit upon which defendant obtained \$50. This money was to pay for certain hogs which the defendant represented he had purchased, and the hogs were to be shipped from Missouri Valley, and the profits were to be divided between witness and defendant. Upon receiving the money defendant went to Missouri Valley, but shipped no hogs, and did not return or account for the money. Soon after going to Missouri Valley witness received certain telegrams purporting to be sent by defendant, and one purporting to be sent by one Brooks, in which telegrams defendant advised witness that he would ship a car load that night, and made other statements in regard to the enterprise. After the defendant was arrested, in a conversation with witness, he admitted that all the representations made were false; that he sent all said telegrams, and that the Brooks message was sent to mislead the witness. The telegrams were read in evidence against defendant's objection, and he assigns this as error.

We think these telegrams were properly admitted. They tended to show the intention of the defendant in procuring the <sup>1. CRIMINAL
law evidence:
intent.</sup> money from Bond. It is said they were not sent until after Bond parted with his money, and not until after the crime was committed. The guilty intent of a party may be shown by his acts, conduct and declarations before, at the time of, or after the commission of a criminal act.

It is urged that the telegrams were not sufficiently identified to allow them to be read in evidence. We think they were.

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Bond testifies that at the time the defendant admitted that he sent the dispatches he called defendant's attention to the contents of each dispatch.

II. The court gave to the jury the following instruction:

"And the representations relied on by Bond must be shown to have been false when made, or a conviction cannot be had, but their falsity may be shown by the admissions of defendant, if such admissions were voluntarily made."

It is insisted that this instruction is erroneous, because a confession would not warrant a conviction unless accompanied by other proof that the offense had been committed. Code, Sec. 4427. And it is said that there was no evidence tending to show the falsity of the representations, aside from the confession. It must be conceded that every other ingredient of the crime was established by other evidence. The fact that the representations were made, that Bond was induced thereby to part with his money, and that the defendant intended to defraud him, are fully established without the confession of defendant; and the fact that defendant did not produce the hogs, nor account for the money, nor report himself, tended very strongly to show that the representations that he had purchased hogs were false. Under these circumstances, together with the fact that the falsity of the representations were but one ingredient in the crime, we think there was no error in the instruction in question.

III. In support of his motion for a new trial, the defendant introduced affidavits setting forth certain newly discovered evidence. Without determining the materiality of such evidence, it is sufficient to say that the evidence itself was not newly discovered, but consisted of personal transactions between the defendant and the witnesses, of which he was fully advised before the trial. He claims that he did not know the names of the witnesses. Due diligence would require that he should have ascertained the names before the trial, or, failing in this, made an application for continuance.

AFFIRMED.

Holbert v. St. L., K. C. & N. R. Co.

HOLBERT v. ST. L., K. C. & N. R. CO.

1. Railroad: FOREIGN CORPORATION: RIGHT OF WAY. A foreign corporation has no power to acquire or possess land for right of way in this State, and cannot therefore be made a party to a proceeding for the assessment of damages for land appropriated for that purpose.
2. _____: _____: _____: INJUNCTION. Where a foreign corporation is using by sufferance the line of a domestic corporation, a land owner is entitled to an injunction restraining it from the use of that portion of the line running through his land until he shall have been compensated for the appropriation of the same for right of way.

Appeal from Davis District Court.

THURSDAY, DECEMBER 7.

THE plaintiff alleges in his petition that he is the owner in fee of certain lands in Davis county; that defendants, a corporation using and operating a railroad in said county, have entered upon, and constructed and are operating their railway over, said land for the distance of three-fourths of a mile, without having obtained from plaintiff the right of way over said land; that plaintiff took the proper legal steps to have his damages assessed, and the commissioners duly appointed assessed plaintiff's damages at eight hundred dollars, from which assessment no appeal has been taken. Plaintiff prays an injunction restraining defendants from operating the road till the damages assessed are paid, and for general relief.

The defendant, for answer, alleges that it is a foreign corporation, organized under the laws of the State of Missouri, having its principal place of business in St. Louis, Missouri, and no place of business in Iowa; that it does not own the railroad in petition described; that it did not build said road, and that it has no power to condemn right of way in Iowa. The answer further alleges that defendant is temporarily running trains of its own on the track of said railroad by mere sufferance and parol license of the real owner of said road, the St. Louis and Cedar Rapids Railway, which was organized under the laws of Iowa, and has its principal place of business in Ottumwa.

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A temporary injunction was granted by the judge in vacation, restraining the defendant as prayed in the petition until defendant pays the damages assessed for right of way, or gives bond in the penal sum of double the amount of such damages, conditioned to pay said damages if so ordered by the court on final hearing. Afterward the defendant gave a bond in the sum of \$1,600, payable on conditions named in the order of the judge. Upon final hearing the court found the equities to be with the plaintiff, and ordered that he be allowed to proceed upon the bond filed by defendant with John W. Ellis as surety to make the amount by the bond secured, unless paid by defendant, and that plaintiff have upon motion such other and further relief, by injunction or other order, as he may be entitled to have in equity.

After this decree was entered, the defendant asked the judge at chambers to make findings in the case as provided in section 2743 of the Code, and the judge, pursuant to this request, submitted the following findings:

"The Court in this case finds, as matters of fact, that at the time of the commencement of the proceedings in this case named as the proceedings of the sheriff's jury, and at the time of the assessment of the damages in such proceedings named, the said defendant was a corporation organized under the law of the State of Missouri, having its principal place of business at St. Louis, in said State of Missouri, but was at such time operating, controlling, using and possessing the said St. Louis & Cedar Rapids Railroad, in the said answer of said defendant named, which said occupation and use of the said St. Louis & Cedar Rapids Railway, and which use and occupation of said road by said defendant was exclusive of any use of or control of the same by the said St. Louis & Cedar Rapids Railroad Company, but without any other contract or lease than as aforesaid. The court further finds that the said St. Louis & Cedar Rapids Railroad had been constructed and was owned at the time of the commencement of said sheriff's proceedings by the St. Louis & Cedar Rapids Railroad Company as aforesaid, and that the same was a corporation formed and organized under the laws of the State of

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Iowa, having its principal place of business at Ottumwa, Iowa; and the Court further finds that at the time of the commencement of said sheriff's proceedings the said St. Louis & Cedar Rapids Railroad was upon and running over and across the said land of the said plaintiff, in the said sheriff's proceedings named, and that the said railroad had been so constructed over and across said land by the said St. Louis & Cedar Rapids Railroad, without the consent of and without any agreement with the plaintiff in regard to the same, and that neither the St. Louis & Cedar Rapids Railroad Company nor the said defendant, the said St. Louis, Kansas City & Northern Railway Company, has ever paid said plaintiff anything for the right of way over said land, nor has the said defendant nor the said St. Louis & Cedar Rapids Railroad agreed to pay said plaintiff anything for such a right of way. The court finds that such sheriff's proceedings were had as required by statute as to regularity, and that said defendant was duly and legally served with notice of such proceedings upon their station agent at Bloomfield, Davis county, Iowa, and that said defendant made no appearance thereto, and took no appeal therefrom as allowed by law, nor yet at any time nor in any manner. And the court finds in favor of the plaintiff all the facts necessary in law for the said plaintiff to show in order to enable him to have the prayer of his petition granted, except the fact of the said defendant being, as aforesaid, a corporation organized under the laws of the State of Missouri, and having its principal place of business at St. Louis, Missouri, as aforesaid; and the said construction of said railroad by said St. Louis & Cedar Rapids Railroad Company, and its ownership of the same as aforesaid, and the said St. Louis & Cedar Rapids Railroad only being owned as aforesaid, and not otherwise leased at the time of the commencement of sheriff's proceedings as aforesaid; and the court finds as matter of law that, notwithstanding all of such matters of fact as hereinbefore set out, the said plaintiff is entitled to the judgment and order in this case entered."

The defendant appeals.

Holbert v. St. L., K. C. & N. R. Co.

Trimble & Carruthers, for the appellant.

Weaver & Payne and *Amos Stickel*, for the appellee.

DAY, J.—I. The defendant is a corporation organized under the laws of Missouri. The authority to take land for the right of way for railroads is conferred by ^{1. RAILROAD:} express provision of statute, and must be exercised in the manner prescribed. ^{foreign corporation:}

The statute under which the plaintiff's damages were assessed by sheriff's jury provides: "That any railroad corporation in this State heretofore organized under the laws of this State, or that may be hereafter organized, may take and hold, under the provisions contained in this act, so much real estate as may be necessary for the location, construction and convenient use of their road." Revision, section 1314.

The right is conferred upon corporations organized under the laws of this State, and is, by necessary implication, denied to foreign corporations. In *The Bank of Augusta v. Earle*, 13 Peters, 519, Mr. Chief Justice TANEY announcing the opinion of the court said: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But, though it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. * * * * * Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied." Whilst, therefore, a foreign corporation might, respecting a proper subject, make a

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valid contract in this State, it could make no such contract for the acquisition of the right of way for the construction of a railroad, since power to acquire such right of way is conferred only upon corporations organized under the laws of this State. Section 1317 of the Revision provides that if the owner of any real estate over which said railroad corporation may desire to locate their road shall refuse to grant the right of way through his premises, the sheriff of the county shall, upon the application of either party, appoint six disinterested freeholders to assess the damages which the owner will sustain by the appropriation of this land. We think it is clear that a foreign corporation could not institute this proceeding to condemn right of way and assess the damages of the land owner. And, as the right conferred is a reciprocal one, it must follow that the land owner cannot institute such proceeding against a foreign corporation. Such a corporation has no power to acquire or possess right of way in this State, and ought not to be required to pay for that which it cannot legally enjoy. The statute authorizes the proceeding for condemnation and assessment to be instituted only against a railroad that may by such proceeding become entitled to the right of way and the privileges connected with it. We think the plaintiff acquired no legal rights under the condemnation proceedings by him instituted.

II. This brings us to a consideration of the relation of the parties and their respective rights, independently of the 2. — : — : injunc- proceedings instituted for the assessment of damages. The St. Louis & Cedar Rapids Railroad Company has constructed a road over plaintiff's premises, and the defendant, by mere sufferance, is in the exclusive occupancy and use of said road. Neither company has paid plaintiff the damages occasioned by the appropriation of the right of way, and both are mere trespassers. *Hibbs v. The Chicago & South Western Ry. Company*, 39 Iowa, 340. This court has held that an injunction will lie to restrain a railroad company from operating its road, after an award of damages under the statute, until the damages are paid. *Henry v. D. & P. R. Co.*, 10 Iowa, 540; *Richards v. D. M.*

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V. R. Co., 18 Iowa, 259; *Hibbs v. C. & S. W. R. Co.*, *supra*. And in *Conger v. The B. & S. W. R. Co.*, 41 Iowa, 419, it was held that ejectment would lie under such circumstances. These all were cases where the railroads were organized under the laws of this State, and were entitled to the right of way upon making proper payment therefor, and where either party might institute the proceedings for condemnation and the assessment of damages. In this case, as we have seen, the defendant, although using plaintiff's land, is not entitled to right of way, and no proceedings can properly be instituted for the assessment of damages. Under these circumstances the right to an injunction ought not to depend upon the fact of a prior assessment of damages. The defendant ought not to be permitted to shield itself by the plea that it is a foreign corporation, against which damages cannot be assessed, and at the same time to continue to use plaintiff's land. Whilst the defendant may not be compelled to pay the damages awarded, it may be restrained from using plaintiff's premises until plaintiff is in some way compensated for the right of way appropriated over his land. It is, therefore, ordered that the plaintiff be awarded an injunction restraining the defendant from further occupying or using the premises in question until the defendant voluntarily pays the damages already assessed, or until the company which constructed and owns the railroad in question causes the plaintiff's damages to be assessed and paid.

Thus modified the judgment of the court below is

AFFIRMED.

Morris v. The C., B. & Q. R. Co.

MORRIS v. THE C., B. & Q. R. CO.

1. **Practice in the Supreme Court: ASSIGNMENT OF ERRORS.** An assignment of errors should point out the very error objected to, and one which stated that "a new trial should have been given for the reasons set forth in the motion," was held not to be sufficiently specific.
2. **Damages: AMOUNT OF: PERSONAL INJURY.** In an action for damages for personal injuries, the amount of the award for loss of power to earn money, and for pain and anguish suffered by reason of the injury, rests within the discretion of the jury.
3. **Negligence: LIABILITY FOR: CONTRIBUTORY NEGLIGENCE.** The plaintiff's negligence will not enable the defendant to escape liability if the act which caused the injury was done by the defendant after he discovered the plaintiff's negligence, and if the defendant could have avoided the injury by the exercise of reasonable care.

Appeal from Fremont District Court.

FRIDAY, DECEMBER 8.

ACTION for damages for personal injuries. The facts are stated in the opinion. Judgment for plaintiff for \$3,000. Defendant appeals.

Hepburn & Thummel, for appellant.

Stow & Hammond and Sapp & Lyman, for appellee.

ADAMS, J.—I. The appellant makes one assignment of error, which is in these words: "The court erred in overruling the motion of defendant in arrest of judgment in the Supreme Court: and for a new trial. A new trial should have been given for the reasons set forth in said motion."

Code, Sec. 3207, provides that "an assignment of error need follow no stated form, but must, in a way as specific as the case will allow, point out the very error objected to." If the assignment of error is sufficiently specific in this case, then the motion for a new trial might in all cases be taken for the assignment, nothing more being necessary than a mere reference to it.

45	29
80	680
45	29
98	186
94	414
45	29
93	263
94	429
45	29
35	310
45	29
98	574
45	29
103	637
45	29
106	953
45	29
111	508
4111	582
45	29
118	346
45	29
116	624
45	29
120	380
45	29
144	293

Morris v. The C. B. & Q. R. Co.

There was no error in overruling the motion for a new trial unless errors had previously occurred, and these errors, if any, constitute the true ground of appellant's complaint. The assignment, therefore, does not, as the Code requires, "point out the very error objected to."

Besides, the law requires this court to decide on each error assigned. Each assignment should require the consideration of but a single error. The errors assigned should be separated and numbered for convenient reference and discussion.

We are of the opinion, therefore, that the assignment of errors in this case is not such as the law contemplates, and might properly be disregarded.

II. We have, however, examined the errors discussed in 2. DAMAGES: appellant's brief, and will proceed to notice them. amount of: personal injury. The court gave the jury the following instruction:

"If the plaintiff is entitled to recover, the measure of his recovery is what is denominated compensatory damages — that is, such sum as will compensate him for the injury he has sustained.

"The elements entering into damage are the following:

"1. Such sum as will compensate him for the expenses he has paid or incurred in effecting his cure and caring for and nursing him during the period that he was disabled by the injury.

"2. The value of his time during the period that he was disabled by the injury.

"3. If the injury has impaired the plaintiff's power to earn money in the future, such sum as will compensate him for such loss of power.

"4. Such reasonable sum as the jury shall award him on account of pain and anguish he has suffered by reason of his injury.

"The first two of these elements are the subjects of direct proof, and are to be determined by the jury on the evidence they have before them. The third and fourth elements are, from necessity, left to the sound discretion of the jury."

The appellant contends that the court erred in saying to

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the jury that the third and fourth elements are, from necessity, left to the sound discretion of the jury.

The court did not say that the jury was not to be guided by such evidence as had been introduced upon those points.

There was considerable evidence in regard to the character of the injury, the pain defendant had suffered, and the disability which, in all probability, he would continue to suffer. There was nothing in the charge of the court calculated to take this evidence from the consideration of the jury. But as there was no evidence and could be no evidence upon these points upon which a computation could be based, the amount of the damages to be allowed was necessarily a matter of discretion. We think the instruction was unobjectionable.

III. The appellant contends that the verdict was contrary to the evidence in that there was no evidence tending to show either that the defendant was negligent, or that the plaintiff was free from negligence.

The plaintiff at the time of the accident was at the defendant's stock yard, in the town of Hamburg, engaged in loading upon the defendant's cars cattle and hogs, which he was about to ship to Chicago. He had negligently left his prod poles at another place, and wishing to know whether he would have time to get them before the arrival of the train which was expected about that time, he stepped upon one of the loaded cars, to which an engine and another car were about to be attached, to look for the train. While he was standing there the engine backed the other car against that on which he was standing, and he fell between them. It is claimed by plaintiff that defendant was guilty of negligence in backing the engine and car with unusual speed and in not giving him warning, of both which facts there was some evidence. On the other hand, defendant claims that the plaintiff was guilty of negligence in standing on the car. It appears that at the time of the accident the plaintiff was standing with his back to the engine, and near the forward end of the car. It will be seen at once that it was a dangerous position if other cars were to be backed against it. Whether, under the circumstances of the case, it

a. NEGLIGENCE: liability for contributory negligence.

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was so manifestly dangerous that we could declare as a matter of law that the plaintiff was guilty of contributory negligence, we need not inquire. We are of the opinion that, taking the evidence altogether, we should not be justified in disturbing the verdict. The evidence shows that at the time of the accident one Platt, who was engaged as an employe of the defendant in making up the train, was standing upon a car next to the one upon which the plaintiff was standing, and saw the plaintiff standing in his dangerous position, and while the plaintiff was so standing Platt signalled to the engineer with his hands and arms to back the engine, and gave the plaintiff no warning.

The plaintiff's negligence will not enable the defendant to escape liability if the act which caused the injury was done by defendant after it discovered the plaintiff's negligence, and if the defendant could have avoided the injury in the exercise of reasonable care. *Wright v. Brown*, 4 Ind., 95; *Macon & R. R. Co. v. Davis*, 18 Geo., 699; *Kerwhacker v. Cleveland & C. R. R. Co.*, 3 Ohio St., 172; *Isbell v. N. Y. & N. H. R. R. Co.*, 27 Conn., 393; *Brown v. Hannibal & St. Joe R. R. Co.*, 50 Mo., 464; *B. & O. R. R. Co. v. State for use of Trainor*, 33 Md., 542; *State v. Railroad*, 52 N. H., 557; *Davies v. Mann*, 10 Mees. & W., 546; *Dowell v. The General Steam Navigation Co.*, 5 Ellis & B., 85 E. C. L., 206; Broom's Legal Maxims, seventh ed., 385, and cases cited.

As Platt exercised control over the movements of the locomotive, it was incumbent upon him to use reasonable care to avoid doing an injury by such movements. And if, as a reasonable man, seeing the plaintiff's position on the car so near the forward end, with his back to the locomotive, he should have apprehended the accident which resulted from the movement produced by his signal, his negligence will be considered the proximate cause of the injury.

Under the evidence we must presume that the question of Platt's negligence was considered by the jury; and it cannot be denied that if their verdict was based upon a finding that Platt was negligent the evidence on that point is sufficient

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to support it. We cannot say, therefore, that the verdict is contrary to the evidence.

AFFIRMED.

PARSONS v. GILBERT, HEDGE & CO.

1. **Specific Performance: DELAY: VENDOR AND VENDEE.** Where a receiver appointed to take charge and dispose of the property of a partnership made a sale of the real estate, with the understanding that the purchasers were to receive a perfect title, and it subsequently appeared that the receiver could not give a good title until the determination of a suit in his favor some months afterward, it was *held* in an action by the receiver to compel specific performance, that the property being purchased for immediate use, the purchasers could not be compelled, after a delay of four months in perfecting the title, to execute the contract of purchase.

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93	22

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120	222

Appeal from Des Moines District Court.

THURSDAY, DECEMBER 7.

N. P. SUNDERLAND filed a petition in the Circuit Court of Des Moines county, setting forth, in substance, that he and one R. C. Kendall were partners and as such owned the property in controversy; that said partnership was largely indebted, and said Kendall having died his heirs were made parties; and the prayer of the petition was that the real estate in controversy be charged with the payment of the partnership debts; that a receiver be appointed and the property sold.

A decree in accordance with the prayer of the petition was rendered. The plaintiff being appointed receiver and having, in accordance with the decree of the court, sold the property at public auction to the defendants, for the sum of \$16,100, and they having declined to complete the contract of purchase, this action is brought to compel a specific performance, which the District Court decreed and the defendants appeal.

Thomas Hedge, Jr. and Chas. H. Phelps, for appellants.

J. & S. K. Tracy, Power & Antrobus and P. Henry Smyth, for appellee.

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SEEVERS, CH. J.—It is conceded that the real estate in controversy was not conveyed to Sunderland and Kendall as partners, but to each individually. There was no specific performance: delay: vendor and vendee. There was nothing on the face of the conveyances, nor any writing showing it to be partnership property. The facts upon which Sunderland based his claim existed wholly in parol. The heirs of Kendall made no defense. Robert K. Griffith, one of said heirs if the property did not belong to the partnership, owned the one undivided fifteenth part. At the time Sunderland filed his petition, and the rendition of the decree, said Griffith was a minor, and although served with notice no guardian *ad litem* was appointed, but he appeared by attorney. It is conceded that the decree did not bind and cut off the right and interest of said minor, if any he had.

The defendants, after the purchase, caused the title to be investigated, and upon finding they could not obtain a full and perfect title, declined to comply with their contract; whereupon plaintiff commenced an action against said Griffith and others, asking substantially the same relief and making the same allegations as in the original petition. A decree was rendered in this action on the 28th day of August, 1874, and there is no pretense but that the interest of said Kendall was cut off by this decree.

The sale to the defendants was on the 28th day of April, 1874. It is insisted the sale made by the receiver was a judicial sale and that defendants purchased at their own risk, and are bound to pay the purchase price whether the title be perfect or not. In support of this proposition, *Dean v. Morris*, 4 G. Greene, 313, and other authorities, are cited.

The abstract states: "It is conceded by counsel on both sides, that in bidding in the property in controversy at \$16,100, it was understood by all the parties that the bidders were to receive a perfect title to all the real estate in controversy, free from all incumbrances."

This means something more than that both parties supposed or understood the title to be perfect, otherwise there was no object in making it. It must and can only mean that the defendants and other bidders were to have a good and perfect

Parsons v. Gilbert, Hedge & Co.

title and were not compelled to bid at their peril. It is but reasonable and proper such an agreement should be made, for it is presumed the defendants well understood they were not to have a warranty deed, but could obtain a quitclaim only. It became important, therefore, that they should examine the title before bidding or have the opportunity of doing so before they completed their purchase, and this without doubt was the object and intent of the agreement. The plaintiff offered the real estate for sale, and he stipulated and conceded the purchaser should have a perfect title, thus naturally and probably inducing the latter to waive an examination of the title, and now the former says he had no authority, or that he did not mean what his words fairly import. To permit such a construction to prevail would, it seems to us, be giving sanction to something very nearly akin to a deliberate fraud.

Counsel cite *Vandever v. Baker*, 13 Penn. St., 420, and *Walden v. Gridley*, 36 Ill., 532. The former holds that the declarations of the crier are not evidence to contradict the terms of sale read by him, and the latter that *caveat emptor* applied to such sales. In neither case was there any agreement like that in this case. The defendants were not bound to complete their purchase and assume the risk of litigation with the minor Griffith. It is true the court in the second action adjudged that he had no interest, but this could not be foretold at the time defendants declined to complete the purchase. *Prima facie* he had an interest; this the plaintiff conceded by bringing the second action.

The defendants at the time of the purchase were engaged in the lumber business, and purchased the property to pile lumber on, and desired it for immediate use, and failing to get a good title to the property they got "other property in its place."

About four months intervened between the purchase and the time plaintiff was able to convey a perfect title. No time was stipulated within which the conveyance should be made. It should, however, be made within a reasonable time, depending upon the uses for which it was purchased. The delay alone would not be sufficient to justify the defendants in

Parsons v. Gilbert, Hedge & Co.

refusing to execute the contract. But such delay, taken in connection with the fact that the property was purchased for immediate use, and other property procured in its place, presents a very different question.

The defendants could have taken possession at once it is said, and this is probably true, and had they done so, as it turned out, they would have incurred no liability in so doing. But they were not bound to take this risk, be it great or small. They had the perfect and absolute right to decline to have anything whatever to do with the property until that for which they bargained, a "perfect title," could be given them. The general rule is that a specific performance will not be decreed except in cases where it would be strictly equitable to do so. Story's Equity, § 750. Nor will courts so decree where the contract is founded in fraud * * * or where from a change of circumstances or otherwise it would be unconscientious to enforce it. Story's Eq., § 750 a; *Harper v. Sexton*, 22 Iowa, 442. Undoubtedly the specific execution of contracts rests in the sound discretion of the court. *Auter v. Miller*, 18 Iowa, 405. And it is regarded as equally well settled if the vendor is unable to convey a perfect title at the time of the sale, and he afterward becomes able to do so, that a specific performance will not be decreed at the suit of the vendor if it appears the vendee has sustained actual and serious injury. *Nodine v. Greenfield*, 7 Paige, 544.

Under the testimony the defendants were prejudiced by the delay. They testify the property was purchased for immediate use, and that they procured other property in its place. There is nothing contradictory to this and it seems reasonable.

Now if they procured other property in the place of this, it must necessarily result they would be prejudiced by being compelled to now take and pay for this property.

The authorities cited by counsel for the appellee are not in conflict with the views herein expressed. For we concede that mere lapse of time alone is not sufficient, nor is it required the conveyance should be made at once, but within a reasonable time is all that is required. We place the ruling on the ground that the defendants have suffered injury, and that it

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would be unconscientious and inequitable to compel them now to perform their contract.

The judgment of the court below will be reversed and the cause will be remanded with directions to the court below to dismiss the petition, or at the option of the defendants a decree will be entered in this court.

REVERSED.

DeLAND ET UX. V. DAY & SON.

1. **Homestead: PRE-EMPTION: PUBLIC LANDS.** The purchase of the improvements of a pre-emptor, and the subsequent occupancy of the land by the purchaser, does not give to it the character of a homestead.
2. _____: _____: CONVEYANCE. Nor can one acquire a homestead right by furnishing the money for the purchase of the improvements of another, who subsequently conveys to him, nor by a conveyance from a pre-emptor. The pre-emptor can only acquire title for himself, and cannot convey to another any interest acquired by pre-emption alone.

Appeal from Osceola Circuit Court.

THURSDAY, DECEMBER 7.

THE plaintiffs bring this action to quiet their title to a certain forty acres of land, which they claim as their homestead. The court rendered a decree for plaintiffs. The defendants appeal. The material facts are stated in the opinion.

Hill & Barclay and Joy & Wright, for appellants.

Chase & Taylor, for appellees.

DAY, J.—The facts of this case are substantially as follows: In February, 1873, plaintiffs owned a farm in Illinois, which they sold for \$4,500. The forty on which they resided, with the improvements thereon, was valued at \$3,000. At this time one J. H. Winspear resided upon and had a pre-emption claim to the southwest quarter of section 12, township 99,

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range 42, in Osceola county, Iowa, which includes the land in controversy. D. M. Shuck, son-in-law of the plaintiffs, resided at Sibley in said county, and was engaged in the lumber and grain business. In April, 1873, the plaintiff, Charles DeLand, came to Osceola county and remained three days. Whilst there, through his son-in-law, Shuck, he purchased of Winspear his improvements on, and an abandonment or surrender of his claim to, the quarter section. For the purpose of making payment of the purchase price, Charles DeLand delivered to Shuck a draft for \$2,000, part of the avails of the homestead in Illinois. Shuck cashed this draft, paid back to Charles DeLand \$200 to bear his expenses back to Illinois, paid Winspear \$1,500, and executed his note for \$500, secured by mortgage, for the balance of the purchase price. At this time Charles DeLand made arrangements to go into partnership with Shuck in the lumber and grain business. He also selected a site for a building, drew the plans therefor, and left them with Shuck to be executed. Charles DeLand then returned to Illinois. Shuck went to the land office at Sioux City, filed a pre-emption claim in his own name upon the said quarter section, and moved into the small house which Winspear had erected thereon. Shuck took charge of the erection of a dwelling house on said land, pursuant to the plan prepared by Charles DeLand, employed and paid the hands, and furnished the lumber from his yard, charging the whole expense, which was about \$3,000, to the individual account of Charles DeLand. On the 2d day of September, 1873, the plaintiffs removed with their family into the house so erected. Shuck also occupied a part of said house, both families eating at the same table.

Shuck procured W. D. Lathrop and John Blake, on the 12th of February, 1874, to prove up, under homestead claims, the said quarter section of land. Blake proved up the north half and Lathrop the south half of said land, and on the next day each conveyed his interest to D. M. Shuck and Charles DeLand. The consideration paid Blake and Lathrop, which was about \$300, was paid by Shuck out of the firm money and charged to DeLand. On the 7th day of April, 1875,

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Shuck and wife conveyed their interest in said land to Charles DeLand. At the time of this conveyance DeLand agreed to pay his indebtedness to the firm, about \$4,000, and to assume the firm indebtedness.

On the 13th day of July, 1873, the defendants commenced selling lumber to the firm of Shuck & DeLand. This firm, at the time that plaintiffs moved upon and commenced occupying the premises in question, owed the defendants for lumber purchased the sum of \$29.65. On the 26th day of February, 1874, Shuck and DeLand executed their notes to defendants for the sum of \$4,000, and secured them by a mortgage on the whole of the said southwest quarter of section twelve.

The defendants brought an action upon these notes, and to foreclose the mortgage. Shuck and DeLand answered that the notes and mortgage had been procured by fraud, and asked that they be canceled. The court set aside the notes and mortgage, and rendered a judgment against Shuck and DeLand, upon the original indebtedness, for the sum of \$4,290. Execution issued upon this judgment, and was levied upon the whole of said quarter section. On the 24th day of July, 1875, the southeast quarter of said quarter section, upon which plaintiffs reside, was sold at sheriff's sale to defendants for the sum of fifteen hundred dollars, the remainder of said quarter section having been before sold on execution to other parties.

To set aside this sale, and to quiet plaintiffs' title to said forty acres, this action is brought. The court found that the property in question is plaintiffs' homestead, and that it is liable for the payment of so much of the judgment only as is based upon the indebtedness existing before the premises were occupied as a homestead.

The legal title to the property in question was not acquired until after the debt was contracted, upon which defendant's judgment was rendered. If, then, plaintiffs can hold the property as their homestead, discharged from the judgment, their right to do so must be based upon some interest which they held in the property at the time their actual occupancy commenced.

It is claimed that plaintiffs acquired an equitable interest in

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the land by the purchase of Winspear's improvements, and the
1. HOMESTEAD: surrender of his pre-emption claim. Winspear
pre-emption: public lands. had no interest in the land. At the most he had
merely his improvements, and possession, and the right to
acquire a title to the land by paying the minimum government
price. *Frisbie v. Whitney*, 9 Wallace, 187.

He could transfer no greater interest than he possessed. The plaintiffs, then, acquired Winspear's improvements, which the evidence shows were worth about \$350, and the right to go into possession of the premises, and file a pre-emption claim, and ultimately to acquire the title by paying the government therefor.

Settlement in person upon the public lands is essential to the right of pre-emption. Revised Statutes United States,
2. —: —: Sec. 2259. Charles DeLand did not settle on the
conveyance. land in controversy at the time the improvements
were purchased. He returned, within three days, to Illinois,
and left his son-in-law, Shuck, to perfect the pre-emption. It
is conclusively presumed that Charles DeLand knew the law
upon the subject of pre-emption, and knew, therefore, that the
pre-emption could not be made in his name. If he expected
Shuck to make the pre-emption in his own name, in the
interest of and in trust for the plaintiffs, then DeLand became
a party to a fraud upon the government, for Sec. 2262 of the
Revised Statutes provides that the pre-emptor shall make
oath before the receiver or register "that he has not settled
upon and improved such land to sell the same on speculation,
but in good faith to appropriate it to his own exclusive use,
and that he has not directly or indirectly made any agreement
or contract, in any way or manner, with any person whatso-
ever, by which the title which he might acquire from the
government of the United States should inure in whole or in
part to the benefit of any person except himself."

DeLand could not have expected the entry to be made in
his own name, and if he expected Shuck to make it in his
name for plaintiffs' use, he intended Shuck to make a false
oath and perpetrate a fraud. In such case he is within the prin-
ciple of *Oaks v. Heaton*, 44 Iowa, 116.

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In virtue of the pre-emption in the name of Shuck, DeLand acquired no equitable interest in the property which he could enforce as against Shuck. By furnishing the money with which the improvements were bought, he acquired a personal claim against Shuck for the money advanced. The property remained in this condition, no title from the government having been acquired, until after the debt was contracted upon which the defendants' judgment was rendered. It follows, we think, that plaintiffs acquired no interest, either legal or equitable, in the premises in controversy until after the debt was contracted, and that they cannot hold the property as a homestead, discharged of such debt.

There are other circumstances which cast suspicion upon the *bona fides* of plaintiff's claim. Notwithstanding the fact that Shuck and DeLand were in possession of the property, they procured Lathrop and Blake to obtain title thereto under homestead claims, and then to convey to Shuck and DeLand. In order to accomplish this purpose it was necessary that Lathrop and Blake each should make oath that the application was made for his exclusive use and benefit, and that his entry was made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person. Lathrop and Blake upon making their entry conveyed to Shuck and DeLand. In the answer which Shuck and DeLand interposed in the suit upon the notes, and to foreclose the mortgage, they alleged that a part of the real estate mortgaged was the homestead of all of the defendants to that suit. This answer is altogether inconsistent with the present claim that the property in controversy was, when the debt was contracted, the homestead of plaintiffs.

The plaintiffs cannot hold the property in controversy upon the ground that the homestead in Illinois was exchanged for it. As we have seen, DeLand acquired no equitable interest in the land for the \$1,800 which he advanced to Shuck. There is no proof that any more of the consideration of the sale of the Illinois homestead went into the property in controversy.

We are of opinion that the court below erred in discharging the property in controversy from the debt in question.

REVERSED.

Olmsted v. Blair.

OLMSTED V. BLAIR ET AL.

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45 42
143 317

1. **Dower: SALE OF REALTY: RES ADJUDICATA.** Where an administrator instituted proceedings in the probate court for the sale of realty to discharge the debts of decedent, making the widow a party, and process was duly served upon her, and the land sold under the order of court, *held*, that the right of the widow to dower was adjudicated in the proceedings for the sale of the land, and that she could not afterward maintain an action therefor.

Appeal from Harrison Circuit Court.

THURSDAY, DECEMBER 7.

THE plaintiff claims in this action to recover her dower interest in certain lands. Her husband in 1861 died seized of the real estate in controversy, and the petition alleges that her dower therein has not been assigned, and she has not relinquished her rights thereto. Other matters set up in the petition need not be stated.

The answer shows that plaintiff's husband, at the time of his death, was indebted beyond the value of his personal property, and that the administrator of his estate instituted proceedings in the proper court of probate for the sale of the lands in question to pay the debts of the estate. This proceeding conformed to the requirements of the law, all the steps having been taken as prescribed by the statute. The plaintiff in this action was made a party to that proceeding, and process issued therein was duly served upon her, but she failed to appear and answer thereto. An order was made for the sale of the lands, and proper proceedings were had thereunder wherein they were sold and duly conveyed by the administrator to the defendant, John I. Blair, on the 30th day of December, 1866. Blair and his grantees have been in possession of the property since the execution of the administrator's deed. The defendants claim and aver that plaintiff's rights to the land were adjudicated in the proceedings wherein they were sold by the administrator. The defendants also set up the statute of limitations as a bar to plaintiff's action.

Olmsted v. Blair.

The plaintiff demurred to the answer of defendants, on the grounds that the facts of plaintiff being a party and having been served with notice in the proceedings for the sale of the lands by the administrator constitute no defense to the action, and that the facts shown in the petition make out no defense under the statute of limitations. The plaintiff's demurrer was overruled. She elected to stand thereon, and judgment, dismissing her petition, was rendered, from which she appeals.

F. Bangs and Clinton, Hart & Brewer, for appellant.

I. N. Kidder, for appellees.

BECK, J.—Two defenses to the action are pleaded in the answer of defendants. They are these: 1. A former adjudication upon the rights of plaintiff set up in her petition, adverse to her claim to the lands. 2. The bar of the statute of limitations. The demurrer admits the facts well pleaded whereon these defenses are based. If either of the defenses are sufficient in law, the demurrer to the answer was properly sustained. In our judgment the first must be so held. It is unnecessary to hold the second good in order to sustain the rulings of the court below. It will not, therefore, be considered or passed upon in this opinion.

We will proceed to consider the sufficiency of the defense of former adjudication assailed by the demurrer of plaintiff. It is based upon the fact that plaintiff was made a party and duly served with process in the proceedings instituted by the administrator for the sale of the lands. It cannot be doubted that, if the subject matter of the action, so far as it includes the claim and right of plaintiff to dower in the lands, was involved in that proceeding, and the court in which the same was determined had jurisdiction thereof and of the person of plaintiff, a decision in such case adverse to plaintiff would be binding upon her and bar her right of recovery in this action. Plaintiff's husband having died in 1861, and the sale of the lands having been made in 1866, her rights and the effect of the proceedings under which the lands were sold must be

Olmsted v. Blair.

determined under the provisions of the Revision of 1860. It may be admitted, for the purpose of this case, that plaintiff's dower interest in the lands of which her husband died seized, was not subject to the debts of her husband's estate. Counsel for defendants concede this proposition, and express the opinion that the case falls within the rule of *Mock v. Watson*, 41 Iowa, 241.

Under the Revision of 1860, if the personal effects of the deceased were inadequate to pay the debts of the estate, a sufficient portion of the lands were allowed to be sold for that purpose. The sale was ordered by the court of probate upon proceedings prescribed by the statute. But prior to the making of such an order notice was required to be given "to all the persons interested in such real estate." §§ 2374—2376. In these proceedings the court had jurisdiction to determine the existence of indebtedness against the estate, the insufficiency of the personal property to pay it, the fact that the land, which the administrator asked the court in his application for authority to sell, was subject to sale for the payment of debts, the quantity to be sold, and whether the interest and rights of those made parties to the proceedings were such that, under the law, the land could or could not be sold. These things constituted the subject matter of the proceedings. The jurisdiction of the court over this subject matter cannot be doubted. Plaintiff was made a party to the proceeding and duly served with notice; the court had jurisdiction of her person. Plaintiff's rights and interest in the lands, as we have just seen, were of the subject matter of the proceeding. If her dower interest had been barred by her own act, if her dower in all the real estate of her husband had been set apart in other lands, or if her dower was unassigned and there were other lands of the estate out of which the law would assign to her dower in preference to the lands in suit or any part of them, in these and other cases the court would be authorized to order the sale of the property free from her claim thereon. The order of the court for the sale of the land must be understood as a judgment for the sale of all the interests therein held by the estate—the fee simple title of all the property. And, if

Anderson v. Haskell.

any of the facts above mentioned existed, the full fee simple title in all the lands and all the interest therein were found in the estate. Upon an adjudication that plaintiff was entitled to no part of the lands in suit as dower, the sale and deed thereunder would have conveyed such interest and title to the purchaser. The plaintiff having failed to set up any objection or defense to the proceedings, being a party thereto, the judgment therein ordering the sale must be regarded as adverse to any claim she held or could have set up. This judgment operates to bar her right of dower in the lands in suit, and forever estops her to set it up in any proceedings. These conclusions are based upon familiar principles and sustained by *Garvin v. Hatcher et al.*, 39 Iowa, 685. No distinction between the facts of that case and this one exists, except in the former the widow appeared and set up her claim for dower. In this case she failed to appear. The judgment in this action, ordering the sale of the lands, had the same effect upon the dower interest as the like adjudication in the other case.

AFFIRMED.

ANDERSON V. HASKELL ET AL.

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133	362

1. **Contract: RESCISSION.** An executory contract may be rescinded upon a failure by the obligor to perform the conditions thereof, and a restoration of him, or an offer to restore him, to the position he occupied when the contract was entered into.
2. _____: _____: **TITLE BOND.** A party is not bound to accept money in payment for land and surrender a bond therefor, if payment is offered before the time fixed in the contract, nor will such offer prevent him from rescinding the contract if payment is not made according to its terms.

Appeal from Cass District Court.

FRIDAY, DECEMBER 8.

ACTION in chancery to enforce the specific performance of a contract to convey lands. Upon a hearing on the merits there

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was a decree for plaintiff. Defendant Haskell alone appeals. The facts of the case appear in the opinion.

A. S. Churchill, for appellant.

Temple & Phelps, for appellee

BECK, J.—The facts of the case, so far as it is necessary to state them, as they appear from the pleadings and evidence, are as follows: The defendants, Lydia, Caroline J., John W., and Alice L. Graham, on the 22d day of September, 1874, executed a bond obligating themselves to convey to plaintiff a certain tract of land in Cass county upon the payment of the purchase money according to the terms and conditions stipulated. The plaintiff alleges that he has made the payment provided for in the bond, and prays in his petition that the defendants named may be required to execute to him a deed for the land. Haskell is made a defendant to the action as one claiming some interest in the property. The Grahams do not contest plaintiff's right to the relief asked. Haskell alleges that one under whom he claims as assignee purchased the land of the Grahams, June 12th, 1873, by a contract with the agent of the owners, whereby he agreed to pay different installments of the purchase money at specified dates, and did pay fifty dollars at the time of the making of the contract, for which a receipt was given him expressing the terms of the agreement. This receipt stipulates that a bond for a deed is to be executed to him as soon as \$200 of the purchase money is paid. He alleges that he went into possession of the land and that plaintiff Anderson had full notice of his rights and equities under the contract of purchase, which he prays, in a cross-bill, may be enforced.

It will be observed that the contest in the case is exclusively between plaintiff and Haskell, and it is conceded if the latter has no right to the land plaintiff is entitled to a decree.

It is not disputed that a contract of the character alleged by Haskell was made by the Grahams, through their agent, for the sale of the land to one Noble, who assigned it to Haskell. The point which we are to determine involves the exist-

Anderson v. Haskell

ence of that contract as a binding obligation; the conclusion we shall reach will settle the rights of the parties to the land.

Haskell as well as Noble failing to pay the money at the time stipulated in the contract, the Grahams treated it as

^{1. CONTRACT:} rescinded and sold the land to plaintiff. In our ^{recession.} opinion, the failure of Haskell to pay the first installment of the purchase money according to the terms of the contract, after more than one demand by the agent of the Grahams for its payment, and notice that in case of default for a period named the contract would be canceled, facts which are shown by the evidence, authorized the rescission of the contract. The rescission, of course, could only have been effected by putting Haskell in the same position he occupied before the contract was executed, that is, by repaying the fifty dollars advanced upon the execution of the contract. This the Grahams, through their agent, more than once offered to do. Besides this, Haskell was in possession of a part of the land, and the evidence authorizes us to conclude that the profits realized by him therefrom exceeded the sum he had paid, fifty dollars. In that case the Grahams were not required to pay or offer to pay the money Haskell had advanced. *Higbee v. Whittaker et al.*, 8 Ohio, 198.

II. Haskell insists that he offered to make the first payment, but did not do so because the agent had not received ^{2. —: —} from the Grahams, who are non-residents, the ^{title bond.} bond to be delivered to the purchaser upon payment of the first installment of the purchase money. This offer, however, was before the day fixed in the contract, and cannot be considered an offer under the terms of that contract. There was no obligation upon the Grahams to have the bond ready for delivery at the time, and they cannot be regarded as in default because it was not ready.

III. Haskell arranged with one Dudley to pay the purchase price of the land and take the deed in his own name. Dudley offered to pay the agent of the Grahams and take the deed. This was after the rescission of the contract, and the offer was refused on that ground. It cannot be regarded as an attempt to perform the contract.

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IV. The evidence, in our opinion, presents the case of the purchaser, Haskell, refusing without cause to perform the terms of the contract, and finally claiming to enforce it when, on account of the increase in the value of the lands, or for other reasons, he finds its performance will be to his own interest. Equity will afford him no relief.

AFFIRMED.

GEORGIA V. KEPFORD.

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1. **Damages: WHEN RECOVERABLE.** Damages are recoverable only when they are the proximate consequence of the act complained of, and not when they are the secondary results thereof, either alone or in combination with other circumstances.
2. — : — : **SLANDER.** An action for divorce on the ground of inhuman treatment, alleged to have been occasioned by a charge of larceny and adultery against the husband, cannot be made the basis of an action for damages.
3. — : — : — . Desertion of the husband by the wife in consequence of the publication of a charge against him of larceny and adultery is not such a natural and proximate consequence of the slander as to entitle him to special damages therefor.
4. — : — : — . *Sembler*, that if the charge had been made for the purpose of inducing the desertion, special damages would have been recoverable therefor.
5. **Slander: WORDS ACTIONABLE PER SE.** Words imputing to a married man a want of chastity are actionable *per se*.
6. — : **LARCENY.** The charge of larceny is substantiated by proof that one unlawfully appropriated the property of another, even though he afterward voluntarily surrendered it.
7. — : **CONFESSiON: EVIDENCE.** A confession of guilt by one who has been charged with a crime will not, in an action of slander, warrant the jury in finding, in justification of the charge, that the plaintiff had been guilty of the crime.

Appeal from Keokuk Circuit Court.

FRIDAY, DECEMBER 8.

THIS is an action to recover damages on account of alleged slanderous words spoken by defendant, in effect imputing to plaintiff the crimes of larceny and adultery.

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The first count of the petition alleges no special damages. The second count alleges that plaintiff was, at the time of speaking the words charged, a married man; that said words were spoken by defendant maliciously to slander plaintiff, and to cause his wife to leave him; that in consequence of so speaking said words plaintiff's wife soon thereafter did abandon him, refused to live with him, and commenced an action of divorce, whereby this plaintiff was to great expense in defending the same, all to his damage in the sum of \$5,000.

The defendant for answer pleads: A general denial; a justification, admitting the speaking the words, and averring the same to be true; in mitigation, alleging defendant had heard plaintiff admit the adultery and larceny, and believing he told the truth, spoke the words without malice.

Plaintiff in reply filed a general denial.

There was a jury trial, and a verdict and judgment for plaintiff for \$500. Defendant appeals.

Woodin & McJunkin, for appellant.

Harned & Fonda, for appellee.

DAY, J.—I. On the trial of the cause the plaintiff introduced evidence tending to prove the speaking by defendant ^{1. DAMAGES:} of the words charged in the petition, and that in ^{when recov-} consequence thereof the wife of plaintiff abandoned him, and thereafter began an action for divorce against him on the ground of inhuman treatment.

The plaintiff was sworn in his own behalf, and was asked the following question: "State what expense, if any, you were to in looking after and defending the divorce suit brought against you by your wife."

The defendant objected to this question on the ground that the damage sought to be proved was too remote. The objection was overruled, and plaintiff answered that he spent thirty days time, worth two and one-half dollars per day, and paid his attorneys twenty-five dollars. The admission of this testimony is assigned as error.

The testimony, we think, was improperly admitted. Dam-

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age to be recoverable must be the proximate consequence of the act complained of; it must be the consequence that follows the act, and not the secondary result from the first consequence, either alone or in combination with other circumstances. *Dubuque Wood & Coal Association v. The City of Dubuque*, 30 Iowa, 176.

An action for divorce on the ground of inhuman treatment is not the proximate consequence of a charge of larceny or adultery.

II. It is claimed that the court erred in charging that the jury might give special damages for the wife's ^{s.} ~~slander.~~ desertion, if caused by the speaking of the slanderous words alleged.

General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place, but are not implied by law; and are either superadded to general damages, arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing. Chitty on Pleading, Vol. 1, p. 458, quoted in Sedgwick on Damages, sixth edition, p. 732. But damages, both general and special, must be the natural and proximate, though not the necessary, consequence of the act complained of. Sedgwick on Measure of Damages, p. 66; *Beach v. Ranney*, 2 Hill, 309 (314). A man is not responsible for all the remote and possible consequences which may result from his act, although he may be a wrong-doer. *Beach v. Ranney*, *supra*.

Now, whilst desertion by the wife of a husband against whom simply a slanderous charge of larceny and adultery had been preferred, might, in exceptional cases, follow, as a consequence of the charge, yet we think that such a result is not the natural and proximate consequence. A rule of law must not be adduced from what might follow in exceptional cases, and with peculiar temperaments, under particular circumstances, but from what is likely to follow under ordinary cir-

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cumstances. A very suspicious or a very credulous woman might desert her husband upon the first slanderous report against him. But the question is not what a very credulous or a very suspicious woman might do, but what would an ordinary woman naturally do? Guided by these principles, we have no hesitancy in holding that, whilst in this particular case the plaintiff's wife may have abandoned him because of defendant's slander, yet such desertion was not the natural and proximate consequence of the slander.

The petition alleges that the defendant spoke the slanderous words for the purpose of causing plaintiff's wife to leave him.

4. —: —: If this had been proved, and the instruction had been based upon the existence of such proof, it would not, probably, have been erroneous. For a party ought not to be permitted to complain that he has been held responsible for results which he sought to accomplish. But there does not seem to have been any proof that the words were spoken for this purpose; nor does the instruction refer to such purpose as an element necessary to recovery.

III. Appellant assigns as error the action of the court in charging that words imputing to plaintiff a want of chastity 5. **SLANDER:** are actionable *per se*. The plaintiff alleges, and words action- able *per se*. as we have not the evidence in the record, we must presume he proved, that he was, at the time of speaking the words, a married man.

The petition alleges that defendant charged plaintiff with being a whore-master, and that he was whoring around Millersburg. Plaintiff being a married man, these words imputed to him the crime of adultery, and they are actionable *per se*.

IV. The court instructed as follows: "Under the defense of justification the defendant has introduced evidence tend- 6. —: lar- ing to show that at one time, many years ago, ceny. while plaintiff and defendant were traveling through the county, the plaintiff caught a pig, the property of another, and avowed his intention of appropriating it to his own use. If you believe from the evidence that plaintiff did catch the pig with the intention to appropriate it to his own use, yet as he did not so appropriate it, but let it go,

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you are instructed that such act did not constitute the crime of larceny, nor was it stealing."

This instruction is erroneous in that it charges that a fact existed; but whether defendant was at all prejudiced by this charge we have no means of determining, for the evidence is not in the record.

The instruction, however, is, we think, otherwise erroneous. If the plaintiff took the pig into his possession with the intention of appropriating it to his own use, he was guilty of the crime of larceny, although he afterward let it go. *Harrison v. The People*, 50 N. Y., 518; *Commonwealth v. Tuckis*, 99 Mass., 431. The fact that plaintiff let the pig go was a proper consideration for the jury in determining the intent with which he took it into his possession.

V. The court instructed as follows: "The confession of plaintiff alone, if he was on trial for the crime of adultery, ^{7. — : con-} unless made in open court, would not warrant a ^{confession : evi-} conviction unless accompanied with other proof that the offense was committed; and evidence alone of plaintiff's admission out of court to the effect that he had committed adultery or larceny would not be sufficient to justify you in finding that the plaintiff was guilty of such crimes." Section 4427 of the Code, 4806 of the Revision, provides that "the confession of the defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that the offense was committed."

In *Forshee v. Abrams*, 2 Iowa, 571 (579), it was held that if a defendant imputes a crime, and justifies in his defense, he must, in order to sustain his plea, adduce such evidence as would be required to convict the plaintiff if on his trial for the crime imputed to him. The same doctrine was held in *Fountain v. West*, 23 Iowa, 9; and in *Ellis v. Lindley*, 38 Iowa, 461. It is claimed, however, that these decisions refer to the *quantum* and not to the kind of proof. This may be admitted. Section 4427 refers to the *quantum* of proof. It does not make the confession of the defendant inadmissible as evidence, but declares that alone it shall not be sufficient in quantity to warrant a conviction. If the confession of the

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accused alone does not warrant his conviction when accused of a crime, under the foregoing decisions such confession will not, in an action of slander, in which the defendant justifies an imputation of a crime, warrant the jury in finding that the plaintiff has committed the crime charged. There is no error in this instruction.

For the errors above considered the judgment is

REVERSED.

THE IND. DIST. OF FAIRVIEW V. DURLAND ET AL.

1. **School District: INDEPENDENT DISTRICT: ABANDONMENT OF ORGANIZATION.** An independent district, embracing territory lying within the limits of two district townships, cannot be deprived of its territory save upon the concurrent action of the boards of directors of both the district townships; and when the organization of one of the townships has been abandoned, the territory lying within the limits of the other cannot be restored to it upon a vote to that effect by two thirds of the voters residing within the township.
2. —— : —— : CONSTRUCTION OF STATUTE. Section 1798 of the Code provides for detaching territory only when both townships are organized as district townships, and each is governed by a board of directors whose jurisdiction extends over the entire township.
3. —— : —— : RE-DISTRICTING. Where a district township had been divided into independent districts, a vote of the electors re-districting the township did not have the effect to destroy the legal existence of an independent district lying partly within the township and partly within another, notwithstanding the directors of the latter had ordered the territory belonging to it to be restored.

Appeal from Keokuk District Court.

FRIDAY, DECEMBER 8.

SUB-DISTRICT No. 7 of Van Buren township, in said county, was formed under the law existing and in force that now constitutes § 1797 of the Code, and was composed of contiguous territory situate in both Van Buren and German townships.

Such sub-district afterward became the independent district

The Ind. Dist. of Fairview v. Durland.

of Fairview, the plaintiff in this action. At or about the same time all the other sub districts in Van Buren township were formed into or became independent districts, and the district township of Van Buren ceased to exist.

Afterward the district township of German attempted to detach from the plaintiff so much of the territory forming a part of the latter as belonged to and formed a part of said township. Previous to this action by German township, the trustees of Van Buren township, in pursuance of a petition, called an election in said township for the purpose of determining the propriety of changing the boundaries of the independent districts of Van Buren township, and to make the number of such districts one less than had previously existed.

The result of this election, and of the action of the township trustees, is that, if valid and legal, the independent district of Fairview has ceased to exist, and independent district No. 7 is constituted in lieu thereof, which embraces a portion of the territory forming a part of the plaintiff, and certain other territory. Independent district No. 7 lies wholly in Van Buren township.

The effect of the ruling of the District Court was that the action aforesaid did not have the effect to deprive the plaintiff of a legal existence, and the defendants appeal.

C. M. Brown and McJunkin, Henderson & Jones, for appellants.

Woodin & McJunkin, for appellee.

SEEVERS, CH. J. — School districts, both independent and township, are creatures of the statute, and may be altered or changed in such manner as the General Assembly may prescribe. If, therefore, statutory authority exists under which the action of the townships of German and Van Buren can be sustained, then the action of the District Court is erroneous; otherwise it is correct.

1. SCHOOL dis-
trict: inde-
pendent dis-
trict: aban-
donment of
organization.

The action of German township, it is claimed, may be sustained under Code, § 1798, which is as follows: "In all cases

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where territory has been or may be set into an adjoining county or township for school purposes, such territory may be restored by the concurrence of the respective boards of directors; but on the written application of two-thirds of the electors residing upon the territory within the township in which the school-house is not situated, the said boards shall restore the territory to the district to which it geographically belongs."

It will be seen that territory belonging to one township and attached for school purposes to another may be detached and restored to the township to which it geographically belongs by the concurrence or joint action of the boards of directors of both district townships. There is no pretense that this has been done. In fact it could not be, for the reason there was no such a thing or artificial being as the district township of Van Buren, and consequently there was no board of directors to concur with the German township board.

The school-house is situate on the territory of plaintiff, within the boundaries of Van Buren township, and on the written application of two-thirds of the electors residing in the territory of the plaintiff within German township, the board of directors of German township ordered the territory within the limits of that township to be restored thereto.

Although the latter clause of § 1798 leaves no discretion in the respective boards of directors if two-thirds of the electors residing in the territory in which the school-house is not situated unite in a written application, nevertheless the concurrence of the boards of directors of both townships is required; and this is a reasonable and just requirement so that the board of the township in which the remaining territory is situate may properly provide for and take charge of such territory and the children residing therein.

In other words, § 1798 contemplates and provides for detaching territory in such cases only when both townships are organized as district townships, governed and controlled by a board of directors whose jurisdiction extends over the whole township.

It is urged, however, that the action of the people of Van

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Buren township, in the vote held by them re-organizing the s. —: —: independent districts of said township, takes the re-districting. place of the required action of the board of directors. It is a sufficient reply to this to say that the statute does not so declare. That it might have so provided is certain; but that it does not is just as certain.

This action is attempted to be sustained under § 1814 of the Code, the object and purpose of which is to enable "township districts to consolidate and organize as independent districts." Admitting that this section applies to townships already organized into independent districts, yet at the time such vote was taken the territory forming a part of plaintiff within the limits of German township still formed a part of the plaintiff, and the people residing therein were not permitted to vote at such election. For the purposes of such election the people residing on said territory were just as much entitled to vote thereat as those residing within the geographical limits of Van Buren township.

The object and purpose of § 1814 is two fold only. 1. To consolidate a district township when it has been divided into sub-districts, and organize the whole township "as an independent district." 2. Where a township has been organized into independent districts, to consolidate the latter "as an independent district" embracing the whole township. The action of Van Buren township by the vote taken and action thereon accomplished neither of these purposes. To consolidate means something more than re-arrange or re-divide. "In a general sense it means to unite into one mass or body, as to consolidate the forces of an army, or various funds. In parliamentary usage, to consolidate two bills is to unite them into one. In law, to consolidate benefices is to combine them into one." Such is Mr. Webster's definition of the word.

For the reasons stated the judgment of the District Court must be

AFFIRMED.

Murphy v. Johnson.

MURPHY v. JOHNSON.

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1. **Practice : INSTRUCTIONS: APPEAL.** If under no possible view of the case the instructions given or refused can be correct, the Supreme Court will review the action of the court below with respect thereto, even if the record does not properly present the evidence offered upon the trial.
2. **Minor: RECOVERY FOR PERSONAL SERVICES: CONTRACT.** Where a minor has rendered services in accordance with the terms of a contract entered into by himself and has received payment for the same, such payment is a full satisfaction for the services and the minor cannot a second time recover therefor.

Appeal from Davis Circuit Court.

FRIDAY, DECEMBER 8.

THE petition states that plaintiff is a minor and unmarried, and that he performed work and labor for the defendant, and that his services were reasonably worth \$180, for which amount he asks judgment.

The answer denies the allegations in the petition, and alleges that plaintiff represented himself to be of age, and defendant so believing he engaged plaintiff, and he agreed to work and do chores for his board and clothing, and that all the labor was done under that agreement; that defendant boarded and clothed him during the time agreed on, and has paid him more than his services were worth, and he owes the plaintiff nothing; that since the commencement of the action he has settled with plaintiff and fully paid him all that was his due.

The reply denied there was any valid settlement between the plaintiff and defendant since the commencement of the suit, and denies defendant has paid plaintiff as alleged, and avers that the settlement was procured through fraud.

There was a trial by jury, verdict and judgment for plaintiff, and defendant appeals.

Weaver & Payne and M. H. Jones, for appellant.

Traverse & Eichelberger and Trimble & Carruthers, for appellee.

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SEEVERS, CH. J.—I. The errors assigned relate solely to the instructions given and refused, and it is objected by the 1. PRACTICE: appellee that no part of the evidence is properly instructions: appeal. before us and that, therefore, we cannot pass upon the pertinency of the instructions or determine they are erroneous. This does not necessarily follow, for if under no possible view that can be taken do the instructions embody correct propositions of law when applied to the issues presented by the pleadings, and if, on the contrary, they are clearly erroneous, then we not only have the power but it is our duty to pass upon and determine the questions presented. *Stevenson v. Greenlee*, 15 Iowa, 96.

II. The issues presented by the pleadings are: 1. Was the plaintiff a minor, and did he perform work and labor for the defendant, and the value thereof? 2. Was 2. MINOR: re- covery for services: con- such labor performed under a contract, and has tract. the defendant fully performed such contract on his part? 3. Was the contract in relation to or made to procure for the minor the necessaries of life? 4. Has there been a settlement since the bringing of this suit? and 5. Was such settlement procured by fraud?

The petition seeks to recover for the personal labor of the plaintiff, and if done under contract, as claimed by defendant in the answer, then it necessarily follows the contract was in relation to the personal services of the defendant.

Under the issues thus presented the court instructed the jury as follows:

"4th. If you find that the plaintiff was a minor at the time of the alleged contract, then he would not be bound by any contract, unless for necessaries, unless you further find that on account of the plaintiff's misrepresentations as to his majority, or from his having engaged in business as an adult, the defendant had good reason to believe the minor capable of contracting, and he would have the right to disaffirm the contract at any time during his minority and for one year thereafter, but in so doing he would be accountable and chargeable with all money or property received by him under said contract when for personal services."

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This instruction is clearly applicable to the issues, and the question is, whether it contains a correct exposition of the law.

The Code provides: 1. That a minor is bound by his contract for necessaries. 2. And also by all other contracts unless he disaffirms them within a reasonable time after attaining his majority, and restores to the other party all the property acquired by virtue of the contract remaining under his control, at any time after attaining his majority. 3. But no contract can be disaffirmed where, on account of the minor's misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting. 4. Where a contract for the personal services of a minor has been made with him alone, and those services performed, payment made therefor to such minor in accordance with the contract is a full satisfaction for those services, *and the parent or guardian cannot recover therefor a second time.* §§ 2238, 2239, 2240.

The instruction recognizes the doctrine that the minor may disaffirm the contract during his minority. But the statute does not so provide, and we apprehend such a thing is unknown to the common law. The presumption is that a minor does not possess the requisite capacity to determine whether the contract is one that should be disaffirmed or not.

It is very clear that the statute recognizes that a contract may be made with a minor in relation to his personal services, and if he is paid therefor in accordance with the contract, the same is a full satisfaction for the services, and that the parent or guardian cannot recover therefor a second time. Now, the jury are told in the instruction under consideration that no contract is binding on the minor except for necessities, unless by reason of his having made misrepresentations as to his majority or engaged in business as an adult the defendant had good reason to believe him capable of contracting. But the rule of the statute is that the minor is bound by *all contracts* unless he disaffirms them within a reasonable time after he attains his majority. Besides this, if the contract be for personal services then the minor is bound by such contract,

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and, if paid in accordance with its terms, it is expressly provided that the parent or guardian cannot recover therefor a second time. The next friend of the minor has no better or superior rights than the parent.

By the common law, a minor was bound by his contract for necessaries in the absence of fraud in obtaining it, and a payment to him in accordance with its terms was binding. *Stone v. Dennison*, 13 Pick., 1. But a contract in relation to his personal services without reference to the question of necessities was not binding, and a payment made to the minor in accordance with the terms of the contract presented no bar to a recovery by the parent or guardian. *White v. Henry*, 24 Me., 531. The object and intent of the statute was to abrogate this rule of the common law.

The petition states that a recovery is sought for the value of the minor's personal services, and the answer alleges the services were performed under a contract, and the instruction recognizes there was evidence tending to prove there was a contract. Without doubt, therefore, we have sufficient before us to enable us to determine the instruction given to be incorrect. The jury should have been told, as the pleadings conceded the recovery was sought for personal services of the minor, that if such services were rendered under a "contract and payment had been made therefor to such minor in accordance with the contract, the same was a full satisfaction for such services, and that plaintiff cannot recover therefor a second time."

The plaintiff is the next friend and his rights are determined now. What may be the rights of the minor if he disaffirms this contract as provided by statute, can only be determined when he does so and seeks a recovery.

REVERSED.

Palmer v. Howard County.

PALMER v. HOWARD COUNTY.

1. **Contract: construction: swamp lands.** Where a proposition for appropriating the swamp and overflowed lands of a county to aid in the construction of a railroad had been ratified by the voters of a county, and a contract in accordance therewith had been made with the company, *held*, that the contract could not be extended to embrace a cash indemnity paid by the government to the county for swamp lands sold before selection.
2. ——: CURATIVE ACT: CONSTITUTIONAL LAW. A subsequent act of the legislature, whose preamble recited that "the proceeds" of the swamp lands had been donated to the company, was *held* invalid to support its claim to the indemnity.

Appeal from Howard Circuit Court.

FRIDAY, DECEMBER 8.

THE plaintiff sues as the assignee of the McGregor Western Railroad Company, and alleges that the defendant, by its deed dated January 12, 1867, conveyed to said company certain claims and rights then held and owned by defendant against the United States, for swamp lands previously sold by the United States, within said county of Howard; that by said deed of conveyance the said company became the owners of this cash indemnity against the United States, for the purpose of aiding in constructing a railway into said county; that on January 25, 1875, there was paid over to defendant the sum of \$3,512, cash indemnity on the lands contained in said deed from the defendant to said company, and that defendant refuses to pay the same to the plaintiff, although due demand therefor has been made. The answer denies the indebtedness, and alleges that the said conveyance of the cash indemnity was made by the chairman and clerk of the board of supervisors, without any authority from the board, and without authority of law, and is therefore void.

There was trial by the court, judgment for defendant for costs, and plaintiff appeals.

Palmer v. Howard County.

George E. Clarke, for appellant.

H. T. Reed, for appellee.

ROTHROCK, J.—I. It appears from the record of the board of supervisors introduced in evidence that in September, 1863,

1. CONTRACT: certain resolutions were passed appropriating to construction: swamp lands. the McGregor Western Railway Company the swamp and overflowed lands of the county, donated and granted by act of Congress. This appropriation was upon certain conditions as to the building of a railroad in said county. Said resolutions further provided that the question of appropriating said lands be submitted to the voters of Howard county, at the general election in October, 1863, and prescribed the following form of ballot: "For donating swamp and overflowed lands to the McGregor Western Railway Company—yes. For donating swamp and overflowed lands to the McGregor Western Railway Company—no."

A contract was entered into by the chairman of the board of supervisors with said company, binding the county to convey to said company all of its "right and title in and to the swamp or overflowed lands belonging to and owned by said county." The proposition and contract were ratified at the election aforesaid. The railroad company failed to build the road within the time stipulated, and an election was held on the proposition to extend the time for the completion of the road, which was carried.

In all the resolutions of the board, and in the contract with the company, in the proclamations for the elections, and in everything pertaining to the question down to the January session of the board in 1867, no mention is made of the claims against the United States for the swamp and overflowed lands which had been sold before the same were selected as swamp lands. The whole proceedings relate to lands to which the county was entitled, and not to cash indemnity. At said January session, 1867, the board adopted a resolution, ordering the chairman and clerk of the board to "convey to the railroad company by quit claim deed, all the swamp and overflowed

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lands to which the county then had title." On the same day, or about that time, a deed was made which conveyed not only nearly 7,000 acres of swamp lands then belonging to the county, but also conveying all the right the county had to cash indemnity for lands sold before selection. This deed was approved by the board of supervisors, and an agent was appointed by the board to prosecute the collection of said claim for the benefit of the railroad company, to be, however, without expense to the county.

The assignment or conveyance of the cash indemnity claim was clearly in excess of the power conferred by law on the board of supervisors. It was nowhere contemplated by the previous resolutions or contracts of the board, and no such proposition or contract was submitted to the electors for adoption. Sec. 988 of the Revision of 1860, under which the original contract with the company was made, provides that before any such contract shall be of any validity the same shall be submitted to a vote of the people. It was a donation of the swamp lands owned by the county which was ratified by a vote of the people, and nothing more; and as the contract was of no validity without a vote of the people, it cannot be extended and made to embrace more than the original contract provided for.

II. It is urged upon the part of appellant that whatever defects there may have been in the proceedings of the board of supervisors, they have been cured by Chapter 37 of the Acts of the Twelfth General Assembly. That act in its preamble recites that it was determined by a large majority of the votes cast by the people that the swamp lands and the proceeds thereof of said county should be donated to the said railway company, and it enacts that the deed executed by the chairman and clerk of the board of supervisors shall be held valid, legal and effectual to convey to said company the property, rights and interests which the same purports to convey.

If the statement contained in the preamble of the act in question, that it was determined by a majority of the votes cast by the people that the swamp lands and the proceeds

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thereof should be donated to the railway company, was true in point of fact, we have no doubt that, under the repeated decisions of this court, this would be a valid curative act. See *Dubuque Female College v. District Township, etc.*, 13 Iowa, 555; *Newman v. Samuels*, 17 Id., 528; *Jones v. Berkshire*, 15 Id., 248; *State v. Squires*, 26 Id., 340, and *Bennett v. Fisher*, Id., 497.

But we have found from the records and proceedings of the board that no such contract was submitted to a vote of the people; it was the swamp land which was owned by the county, and that only, which was by vote of the people donated to the railroad company, and the board of supervisors had no power to transfer a cash claim owned by the county to the railroad company. In *Bennett v. Fisher*, *supra*, it is said: "The interests of justice, and the general good of the community, frequently require and sanction such legislation, although it should be borne in mind by the legislator that such exercises of power can only be defended upon principle and sustained in law when they are not directed against the vested rights of particular individuals or classes, but have their origin in a just regard for the public welfare."

"Questions of this character very much depend upon the peculiar circumstances of the cases in which the legislative power is exercised. There may be retrospective legislation so palpably destructive of private and vested rights that it is the duty of the court to declare it to be inoperative."

This Act in question does not cure a defect in the proceedings of the board, or in the submission of the question to a vote of the people. It attempts to make valid a deed or assignment of the board of supervisors, by which some \$3,500 of the money belonging to Howard county is donated to the railway company, without any authority of law. It could only be done by a vote of the people, and in the absence of such vote it was a most palpable violation of the vested rights of the county and its tax payers.

AFFIRMED.

Jordan v. Wimer.

JORDAN V. WIMER ET AL.

45	65
105	145

1. **Practice: TRIAL: APPEAL.** An equity cause is triable in the Supreme Court upon the errors assigned, notwithstanding no motion may have been made in the court below for a trial upon written evidence.
2. **Vendor's Lien: WHEN IT EXISTS.** The vendor of real estate has a lien upon the property sold for the unpaid purchase money, independent of the existence of a lien evidenced by a title bond or mortgage.
3. ——: RECORDING OF: CONSTITUTIONAL LAW. Section 1940 of the Code, which provides that no vendor's lien shall be enforced after a conveyance by the vendee, unless the lien is recorded, cannot apply to sales made before the enactment of the statute. *SEEVERS, CH. J., dissenting.*
4. ——: OBLIGATION OF A CONTRACT. The right to a lien upon the property sold, against the vendee and his grantees, constituted a right vested in the vendor, which formed an essential part of the contract of sale. *SEEVERS, CH. J., dissenting.*
5. ——: AMOUNT OF: SUBSEQUENT MORTGAGE. The lien of a vendor is not defeated by the fact that the amount of the lien was not known to the mortgagee.

Appeal from Keokuk District Court.

MONDAY, DECEMBER 11.

On the 8th day of April, 1870, Gabriel F. Snyder sold and conveyed to E. M. Wimer certain real estate for the sum of \$4,000, all of which was paid at the time of making the deed, except the sum of \$1,150, which was to be paid in two years from that date. No note, mortgage nor any kind of writing whatever was executed for the unpaid purchase money.

On the 29th day of March, 1872, E. M. Wimer executed a promissory note to George Storm for the sum of \$2,000, due June 1st, 1873, secured by a mortgage on an undivided one-half of the premises conveyed to him by Snyder. On the 16th day of March, 1873, Storm duly transferred the note and mortgage to W. A. Jordan. On the 6th of May, 1873, Wimer and wife, to better secure said note, executed to the holder, W. A. Jordan, a mortgage on the other undivided half of said premises. Storm had full knowledge that the purchase money had not been paid in full to Snyder, before he took his mort-

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gage on the land. Jordan also, at the time of the assignment of the note and mortgage to him, and of taking the additional mortgage, knew that the purchase money had not all been paid. On the 22d day of July, 1875, the plaintiff, as the administrator of W. A. Jordan, deceased, commenced an action against E. M. Wimer for the amount of the note and a foreclosure of the mortgages. On the 4th day of August, 1875, Snyder intervened, claiming of Wimer a judgment for the unpaid purchase money, and asking that his vendor's lien be declared superior to the lien of said mortgages. The court rendered judgment in favor of the intervenor against Wimer for the sum of \$1,150 and established a vendor's lien therefor on the premises sold, but declared the plaintiff's mortgages a lien paramount to that of the vendor. The intervenor appeals. No notice of appeal was served upon the defendant, Wimer.

C. M. Brown and Stubbs & Leggett, for appellant.

Woodin & McJunkin, for appellee.

DAY, J.—I. It is claimed that appellant is not in a position to be heard in this court, because no motion was made for a trial upon written evidence. The abstract ^{1. PRACTICE:} _{trial: appeal} contains all the evidence. There is no conflict or dispute respecting the facts. Errors have been assigned. Whilst, therefore, appellant may not be entitled to a trial *de novo*, he has a right to have the errors assigned considered. *Walker v. Plumer*, 44 Iowa, 406.

II. Appellee claims that the doctrine has never yet been adopted in this State that the vendor shall have a lien, independently of the title bond or mortgage, for his ^{2. VENDOR'S} _{lien: when it exists.} purchase money, and it is insisted that such lien does not exist. This point was determined adversely to appellee in *Johnson v. McGrew*, 42 Iowa, 555.

III. The principal question in the case arises under section 1940 of the Code, which is as follows: "No vendor's lien for unpaid purchase money shall be recognized or enforced in any court of law or equity after a conveyance by the vendee, unless such lien is re-
^{3. — : re-}
_{— : according of constitutional law.}

Jordan v. Wimer.

served by conveyance, mortgage, or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit brought by the vendor, his executor or assigns, to enforce such lien. But nothing herein shall be construed to deprive a vendor of any remedy now existing against conveyances procured through the fraud or collusion of the vendees therein, or persons purchasing of such vendees with notice of such fraud."

Appellee contends that, under this section, the intervenor has no lien as against the mortgagee of the premises, no lien having been reserved in any written instrument. The intervenor insists that this section cannot, constitutionally, apply to his contract of sale, which was made before the section was enacted.

The Constitution of the United States, Art. 1, section 10, provides that no State shall pass any law impairing the obligation of contracts. The Constitution of this State, Art. 1, section 27, imposes a similar restriction upon legislative authority.

To this appellee responds that there was no contract that the intervenor was to have a lien, and that, for this reason these constitutional provisions are not applicable. Citing *Porter v. City of Dubuque*, 20 Iowa, 440. It must be remembered, however, that it is not *a contract* simply but *the obligation* of a contract which the constitution preserves from impairment. The obligation of a contract includes much that is not expressly stipulated for in the contract.

"The obligation of a contract consists in its binding force on the party who makes it. This depends upon the laws in existence when it is made; these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the per-

Jordan v. Wimer.

formance by the remedies then in force. If any subsequent law affected to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence, any law which, in its operations, amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution." Cooley's Constitutional Limitations, 2d ed., p. 285, and cases cited. In *Ogden v. Saunders*, 12 Wheat., 213, WASHINGTON, J., said:

"The obligation of a contract * * * is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract, in every shape in which it is intended to bear upon it, whether it affects its validity, construction or discharge. It is, then, the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout whenever its performance is sought to be enforced." In the same case, THOMPSON, J., said: "As I understand it, the law of the contract forms its obligation." In the same case TRIMBLE, J., said: "The obligation of the contract consists in the power and efficacy of the law which applies to, and enforces performance of, the contract, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the constitution uses the term obligation." Cooley on Constitutional Limitations, p. 285, note.

The action of this court has been in entire harmony with these principles. In *Rosier v. Hale*, 10 Iowa, 470, it was held that "An Act to provide for the appraisement of property sold under execution, approved March 31, 1860," cannot constitutionally apply to contracts entered into prior to the date of its taking effect. In *Maloney v. Fortune*, 14 Iowa, 417, it was held that section 3664 of the Revision, allowing a year's redemption after foreclosure sales, is inconsistent with the Constitution of the United States, and with that of the State

Jordan v. Wimer.

of Iowa, so far as it affects contracts made prior to its passage. See, also, *Harlan v. Sigler*, Morris, 39, and *Griffey v. Payne*, Id., 68.

Applying these principles to the case in hand, the solution of it is easy.

On the 8th day of April, 1870, the intervenor sold and conveyed the premises in question to Wimer, eleven hundred and fifty dollars of the purchase money remaining unpaid. In virtue of his contract of sale and conveyance, he acquired a right to a lien upon the premises, against Wimer and his grantees with notice, for the unpaid purchase money. This right, secured by the law then in force, forms a part, and a very essential part, of the obligation of the contract. Any legislation which destroys this right, impairs the obligation of the contract. It seems to us quite clear that section 1940 of the Code cannot constitutionally apply to contracts made before its passage.

IV. It is claimed, however, that the lien of the mortgagee must take precedence of that of the vendor, because
~~5. —~~: the evidence does not show that the mortgagee
~~amount of:~~ knew how much of the purchase money was
~~subsequent~~
~~mortgage:~~ unpaid.

But we think that, having knowledge that purchase money was unpaid, it was his duty to inquire and ascertain how much was unpaid.

V. Appellant insists that his judgment is for too small an amount. But, as he has not made his debtor, Wimer, a party to the appeal, he can have no relief in this respect.

The court erred in postponing the lien of the vendor to that of the mortgagee.

REVERSED.

SEEVERS, Ch. J., dissenting.—I feel compelled to withhold my assent to so much of the foregoing opinion as holds that the lien of the intervenor has priority over the mortgage. My reasons briefly are:

I. It is conceded in the opinion that § 1940 of the Code applies to transactions that took place prior to its passage,

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and it is assumed that the lien of the vendor is acquired by virtue of the "contract of sale and conveyance."

It is said in *Porter v. Dubuque*, 20 Iowa, 440, that the lien of the vendor is "not based on contract," "nor is it an equitable mortgage or resulting trust. It is a simple equity raised and administered by courts of chancery."

The principle upon which courts of equity have gone in establishing this lien is that one person has gotten the estate of another which he ought not to keep without paying the full consideration. The lien cannot be "attributed to the tacit consent or implied agreement of the parties, but stands independently of any such agreement." 2 Story's Equity Jurisprudence, §§ 1219, 1220.

The lien is a mere equity or capacity of acquiring a lien, and to have it satisfied. But it is not an equitable estate in the land itself. Nor can its existence be safely predicated in any case until established by a decree of the court. *Gilman v. Brown*, 1 Mason, 162. The lien of a judgment or attaching creditor has priority over that of the vendor. *Allen v. Loring*, 34 Iowa, 499.

What was the contract between the intervenor and vendee? Simply that in consideration of the sale and conveyance of the land the vendee agreed to pay the purchase price. The intervenor thereupon became entitled to a lien, in case the purchase money was not paid, against the vendee and subsequent purchasers, or incumbrancers with notice. But this was not an obligation of the contract. At most it was an incident attaching thereto, which might or might not be enforced, not because based on contract, but because the vendee has possession of property which he has not paid for.

If the lien constitutes an obligation of the contract, it attaches at the instant the contract is made. This, however, cannot be, for the contract precedes the conveyance. It cannot and does not attach at the conveyance, but at the time a court of equity gives it vitality and by its decree causes it to relate back to the purchase, provided there are no intervening equities. It is difficult, therefore, to see how it forms an obliga-

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tion of the contract. If it does not, it will be conceded, I presume, that § 1940 of the Code is not unconstitutional.

II. Previous to the enactment of the Code the reservation of the lien by any writing was not required; but the facts essential to its enforcement might be shown partly, at least, by parol.

Section 1940, however, declares that the lien shall not be *recognized or enforced* unless it is reserved by some writing, acknowledged and recorded. This, in my opinion, is a mere rule of evidence, degree or kind of proof requisite to establish the existence of the lien, and therefore relates to the remedy only. Cooley on Constitutional Limitations, 288.

Suppose the General Assembly should repeal the statute of frauds, and enact in its place that no writing should, in any case then pending or thereafter brought, be required to establish any of the matters now required to be proved by writing. Will it be said such a law would be unconstitutional? Or suppose, by the law now in existence, a parol promise is sufficient to revive a debt barred by a discharge in bankruptcy or the statute of limitations, and the General Assembly should pass a law making all such promises void unless in writing. That such a law would be constitutional, and parol promises made before its passage held void, was expressly decided in *Kingley v. Cousins*, 47 Me., 91.

The legislature may prescribe what shall and what shall not be evidence of any asserted fact, whether it shall be in writing or oral; and it can make no difference whether it be in reference to contracts existing at the time or prospectively. There is not and cannot be a vested right in a particular remedy, or that what is to-day legal evidence of a fact will always remain so. *Oriental Bank v. Frye*, 10 Me., 109; *Fales v. Wadsworth*, 23 Me., 553; *Springfield v. County Commissioners*, 6 Pick., 501.

III. It is a difficult question to determine what relates to the obligation of a contract and what to the remedy. No general rule can be laid down. Nor can this question be satisfactorily solved by a consideration of the language used by

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the learned judges who have delivered opinions in causes in which this subject was under consideration.

The point decided in *Ogden v. Saunders*, 12 Wheaton, 213; *Bronson v. Kinzie*, 1 How., 311; and *McCracken v. Hayward*, 2 How., 608, should, I apprehend, be conclusive in any subsequent case based on similar facts. It can be well said, however, that in none of those cases are the facts like the case at bar. There is a class of cases which, to my mind, more nearly resemble this — those which recognize that imprisonment for debt does not form an obligation of the contract. It is held that a discharge of the person of the party from imprisonment does not impair the obligation of the contract, but leaves it in full force against his property and effects. *Beers v. Haughton*, 9 Peters, 329. So here, the discharge of the lien does not impair the obligation of the contract, but leaves it in full force against the property and effects of the vendee. This might be different if the lien constituted an obligation of the contract.

In *Morse v. Goold*, 1 Kernan, 281, it was held that a law exempting certain property from levy and sale applies to judgments rendered on contracts entered into before as well as after its passage. See also *Walter v. Bacon*, 8 Mass., 468; *Bigelow v. Pritchard*, 21 Pick., 169.

It was expressly stipulated in a lease that the lessor might distrain for rent. Afterward a law was passed abolishing distress for rent. It was held such law was constitutional, and did not impair the obligation of contracts. *Conkey v. Hart*, 4 Kernan, 22; *Van Renssalaer v. Snyder*, 3 Id., 299.

Rosier v. Hale, 10 Iowa, 470, is not, in my judgment, applicable. And I think *Holland v. Dickerson*, 41 Iowa, 367, is in conflict therewith. The latter holds that the obligation of a contract is not impaired where the remedy is by the legislature so changed as to make it more efficient than previously; that to impair makes worse; to so change the remedy or obligation of the contract as to make it more efficient is to impair or change it against the interest and desire of the other party. There must be at least two parties to every contract—their obligations are different. To make it better for

Ivins v. Hines.

one party necessarily must impair it as to the other. It is difficult to see why the right of redemption within a specified time is not as much an obligation of the contract to one party as the other. And why the time within which it is to be made can be taken away or lessened, and it may not be lengthened or made to apply to contracts entered into previous to its passage.

The vendee has not appealed from the judgment establishing a lien, but postponing it to the mortgage. I therefore am of opinion the judgment below should be affirmed.

IVINS v. HINES.

35	73
94	211
45	73
114	623
45	73
129	506

1. **Mortgage: UPON CHATTELS: UNCERTAINTY OF DESCRIPTION.** The description in a chattel mortgage should be so explicit as to enable third persons, aided by the inquiries which the instrument itself suggests, to identify the property covered thereby, and a mortgage mis-describing property will not affect the purchase of the same by a third party by imparting to him notice of the incumbrance.

Appeal from Pottawattamie District Court.

MONDAY, DECEMBER 11.

THE plaintiff filed in the Pottawattamie District Court his petition, claiming of George Doughty, sheriff, the immediate possession of thirty-seven head of cattle, amongst which were three cows, each branded with "Ivins" on horn, and letter "J" on hip, and alleging that defendant holds the same in virtue of the levy of an execution thereon as the property of one William M. McMahon.

T. J. Hines filed in said cause a petition of intervention, claiming to be the absolute owner of the stock, in virtue of the assignment to him of a chattel mortgage executed to one Rand, dated and recorded Feb. 12, 1874. The mortgage contains the following description: "Fourteen cows, branded with star on right horn." The plaintiff for answer to the petition

Ivins v. Hines.

of intervention says, "that the mortgage does not embrace, describe or include any of the property in controversy in this action."

The cause was tried by the court, who rendered judgment for the intervenor for three cows, of the value of ninety dollars. Plaintiff appeals.

Clinton, Hart & Brewer, for appellant.

Sapp & Lyman, and *B. W. Hight*, for appellee.

DAY, J.—The evidence establishes, without any conflict, the following facts: In 1872 and 1873 the plaintiff purchased thirty-six head of young cattle, and gave them to William McMahon to keep. Plaintiff was to have the sole ownership and control of the cattle, and was to dispose of them when he saw proper, and McMahon was to have one-half the net profits for feeding and caring for the cattle, the intention being to grow and fatten them for market. The cattle were all branded "J" on hip, and "Ivins" on horn. In July, 1875, plaintiff learned that McMahon had been disposing of some of his cattle, and he immediately investigated the matter, and had an accounting. At that time McMahon turned out to plaintiff the cattle in controversy. From twelve to fifteen of these were the cattle originally purchased by plaintiff. The others were given by McMahon in lieu of those disposed of by him.

The plaintiff had them all branded as described in the petition, and they remained on the range near McMahon's farm.

On the 12th day of February, 1874, to secure the payment of \$750, McMahon executed to J. S. Rand a chattel mortgage upon certain property, amongst which was the following description: "Fourteen cows branded with star on right horn." This mortgage was recorded on the 12th day of February, and was assigned to Hines on the 16th day of the same month. McMahon, at the time he gave the mortgage to Rand, had a herd of cattle seventy or eighty in number. Those intended to be described in the mortgage were not, at the time of the execution of the mortgage, branded at all, but

Ivins v. Hines.

McMahon promised that he would have them branded to correspond with the brand stated in the mortgage. He failed to do this, and the cattle were never branded as stated in the mortgage. McMahon stated at the time that the mortgage was intended to apply to his home herd—the stock he intended to keep as home stock. Rand was well acquainted with McMahon's stock when he took the mortgage. The three cows claimed by Ivins were among those mortgaged to Rand. Neither Rand nor Hines knew that Ivins claimed any interest in McMahon's herd until July, 1875.

The plaintiff, at the time the cattle were turned out to him, had no knowledge whatever of the mortgage from McMahon to Rand. McMahon said that he had exchanged those purchased by plaintiff for many of those he was turning over, and that they were free from liens.

Under these facts, we think the court erred in finding the intervenor entitled to the three cows in controversy. The <sup>1. MORTGAGE
upon chattels:</sup> mortgage under which intervenor claims described ^{uncertainty} the cows intended to be included in it as "branded of description, with a star on right horn." The cattle turned out to plaintiff were not so branded. The true rule respecting the sufficiency of a description in a chattel mortgage is that stated in *Smith & Co. v. McLean*, 24 Iowa, 322, as follows: "That description which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property is sufficient." The chattel mortgage in question, instead of indicating or suggesting inquiry, was calculated to suppress all inquiry. It contained a specific designation of the property included within it, "fourteen cows, branded with star on right horn." When property was offered to plaintiff containing no such brand, he certainly had a right to conclude that the mortgage did not refer to it. If the description had been simply fourteen cows, perhaps reasonable prudence and caution should have suggested to him to inquire what cows were meant. But the natural effect of the specific description was to stifle all further inquiry.

It is claimed, however, that appellant was no way prejudiced by this description, because he had no knowledge whatever of

Campbell v. The C., R. I. & P. R. Co.

the existence of the mortgage. It will not do, however, to hold that, having no knowledge of the mortgage, plaintiff is in a worse position than if he had known of its existence. It is simply because of the constructive notice which the record of the mortgage imparts that plaintiff is bound by it at all. If it had not been recorded, it would, as to plaintiff, have been altogether ineffectual. It would be anomalous to say that plaintiff is bound by the mortgage because the record imparts to him constructive knowledge of its contents, and, at the same time, that he was no way misled by its description of property, because he did not know of its existence.

REVERSED.

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142 667

CAMPBELL v. THE C., R. I. & P. R. Co.

1. **Evidence : MATERIALITY: RAILROADS.** In an action against a railway company for damages for causing the death of plaintiff's intestate, evidence to the effect that the company offered to pay the latter's funeral expenses is not material.
2. **Railroads : HAND CAR: NEGLIGENCE.** It is not necessarily negligence to run a hand car over a railway when a train is past due, even though more than ordinary danger is incurred thereby. The measure of care required must be estimated with a view to the safety of the employes operating the hand car, and of the passengers upon the train, and determined by the facts of each particular case.

Appeal from Guthrie District Court.

MONDAY, DECEMBER 11.

THE plaintiff's intestate, her husband, Michael Campbell, was in the employ of the defendant as a section hand on its railroad, and while so in its employ was fatally injured by being run over by a hand car. The accident occurred in the following manner: The hand car was moving eastward under the direction of the section boss; the deceased and three or four others were riding on it for the purpose of inspecting the road; the passenger train from the east was past due; the ap-

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proach of the passenger train was discovered when about forty or fifty rods distant; the brake was applied to the hand car to stop it; the deceased stepped or was thrown off in front of the hand car and was run over by it and received injuries of which he died. The plaintiff claims the right to recover on the ground that the section boss was negligent in running said car.

Verdict and judgment for plaintiff. Defendant appeals.

Wright, Gatch & Wright, for appellant.

Carpenter & Whitney, for appellee.

ADAMS, J.—I. The plaintiff testified that she paid the funeral expenses of her husband. She was then asked by her

1. EVIDENCE: counsel the following question: "Did any one offer materiality: to pay them, and if so, who? Was it any one on the part of the railroad company?" This question was objected to as immaterial, and the objection overruled; and she answered that Mr. Cox, the road master, offered to pay the funeral expenses.

In admitting this testimony we think that the District Court erred. We can conceive of no reason why it was introduced except as an admission on the part of the company of its liability, and it could not, of course, be properly introduced for that purpose. It is claimed by the appellee that it was introduced to prove that the deceased was in the employ of the company, but it did not tend to prove such fact. In no aspect could it be so regarded except as involving an admission of liability, and it is not claimed that it was admissible for that purpose.

II. The court gave the jury the following instruction:

"11. Unless there was more than ordinary danger in so doing, the section boss was not required to refrain from going 2. RAILROADS: on the track with his hand car and men, because hand car: negligence. the express train was behind time, and until it should have passed; and if you find that there was no reasonable apprehension of danger in his so doing, and that after going on the track he proceeded with due care toward the approaching train, and did not run so close thereto as that

Campbell v. The C., R. I. & P. R. Co.

he did not have sufficient time to remove the car from the track with safety to the men before the train reached them, then he was not guilty of negligence in so doing."

In giving this instruction we think that the court erred. The plain implication is that if there was more than ordinary danger the section boss should have refrained from taking the section hands upon the track until the train should have passed. There is, of course, more than ordinary danger in operating a hand car upon a track where a train is past due from either direction. Yet we have no doubt it is sometimes necessary that this should be done. If section hands should refrain from going upon the road at such times, the road would be uninspected no inconsiderable portion of the time. The necessity of inspection and repairs must be as great when trains are past due as at any other time. Indeed, it must often be greater. Time is often lost by trains by the general bad condition of the road. The safety of passengers requires that vigilance respecting the road bed should not be relaxed at all times when trains are past due.

What measure of care is necessary in running a hand car where trains are past due is another question. Reference should be had to the safety of the employes on the hand car on the one hand, and to the discharge of their duty so as to omit no reasonable care required by the safety of passengers on the other hand. Difficulties may arise by reason of these conflicting considerations. If so, each case must be determined upon its own facts. It is sufficient to say, in this case, that the safety of the section hands was not of such paramount importance as to make it necessarily negligence in the section boss to take them upon the road in the hand car when a train was past due, although more than ordinary danger was incurred thereby. *Frandsen v. The Chicago, Rock Island & Pacific R. R. Co.*, 36 Iowa, 372.

We are of the opinion that the judgment of the District Court must be

REVERSED.

The C., D. & M. R. Co. v. Schewe.

THE C., D. & M. R. CO. V. SCHEWE.

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1. **Contract: construction of railroad.** Where a party agreed that he would give to a railway company a sum named if the railway should be constructed, and a train running to "within one mile of Elkport Post Office" at a time specified, and the road was built at the time named in the contract and the depot located within one mile of the post office, and on the day specified a passenger train ran to a point within two hundred yards of the depot, it was held that the company had substantially complied with the terms of the contract and the subscriber was liable thereon.

Appeal from Clayton Circuit Court.

MONDAY, DECEMBER 11.

THIS action is brought to recover upon an instrument which is in the following words:

"\$25.00.

"ELKPORT, Iowa, September 25, 1871.

"In consideration of the benefit which I expect to derive from the construction of the Chicago, Dubuque & Minnesota Railroad, I promise to pay said company twenty-five dollars, as soon as said road shall be built, and the cars running thereon, to within one mile of Elkport post office, and a depot located and built within same distance, provided that this obligation shall be void if the road shall not be running as aforesaid by the first day of September, 1872, but if the road is running up Turkey river instead of Volga river this subscription is considered to be void.

HENRY SCHEWE."

The plaintiff avers that the road was built, and the cars running thereon, to within one mile of Elkport post office by the first day of September, 1872, and that the road is not running up Turkey river instead of Volga river. The defendant's answer admits the execution of the instrument, but denies the other allegations of the petition. Judgment for defendant. Plaintiff appeals.

The C. D. & M. R. Co. v. Schewe.

S. P. Adams and Stoneman & Chapin, for appellant.

L. O. Hatch, for appellee.

ADAMS, J.—The evidence shows that by the last day of August, 1872, the road was ironed to the Elkport depot, which was a little more than three-fourths of a mile from the Elkport post office, and that a construction train ran over it on that day; that on the 1st day of September a passenger train ran to within about 200 yards of the depot, but it does not appear whether it ran within a mile of the Elkport post office or not. The evidence further shows that afterwards neither freight nor passenger trains were run for a considerable time, but that a mixed train, which was essentially a construction train, was run for the purpose of hauling timber to build a bridge, and to accommodate what travel there was. After about ten days the construction train was taken off, and a tri-weekly freight train with a caboose attached was run. The depot was only partially built on the 1st day of September, but was completed by the last of September.

The question in this case is as to whether the plaintiff had complied with its contract at the time the suit was commenced, which was on the 1st day of September, ^{construction} 1873. We are of the opinion that it had substantially. It was not necessary that the depot should be built by the 1st day of September, 1872. It was necessary that the road should be running by that day to within one mile of Elkport post office. As to the depot it was sufficient if that was built before the suit was commenced; and it was built by the last day of September, 1872.

Whatever doubt there is about the case arises upon the question as to whether the road was running by the first day of September, 1872, to within a mile of the Elkport post office, within the meaning of the contract.

An unmixed construction train was running earlier than that, but we do not think that the running of that train was a performance of the contract. The defendant was not interested in the running of a train that was used simply in the

Wallace v. York.

building of the road. It was evidently his intention to provide that the road should be running by the 1st day of September, for the accommodation of the public. On that day a passenger train ran within about 200 yards of the depot, but perhaps not within a mile of the Elkport post office. Had it run to the depot, it would according to the evidence have run within a mile of the post office. It appears that there was a construction train on the track at the depot. Whether the passenger train stopped where it did because the construction train was on the track, or for some other reason, does not appear. It is certain that it did not stop because the road was not completed to the depot. We think, then, that the fact that the train stopped some 200 yards before it reached the depot may be regarded as unessential, and that the depot may be regarded as the destination of the train, and as essentially reached by the train.

In our opinion the road was running to the depot, within the meaning of the contract, by the 1st day of September, and the plaintiff was entitled to recover.

REVERSED.

WALLACE ET AL. V. YORK ET AL.

1. **Injunction: ACTION UPON BOND: DAMAGES.** In an action upon an injunction bond for damages for the wrongful suing out of the writ, the plaintiff may recover for the services of counsel in the preparation of a motion to dissolve, and affidavits to sustain it, if made in good faith, although in fact the motion be not passed upon by the court and the injunction only dissolved upon final hearing.

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125 414

Appeal from Marshall District Court.

MONDAY, DECEMBER 11.

Action brought on an injunction bond to recover damages sustained by the plaintiff by reason of the unlawful issuing of the injunction. The averments in the petition were controverted by the answer. The bond was conditioned to pay

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all damages sustained by plaintiffs by reason of the wrongful issuance of the injunction. The petition states "that the injunction was an independent and not an auxiliary proceeding; that a motion was made to dissolve the injunction and affidavits filed in support of both sides of the motion, but said motion was not finally decided by the court, because the same evidence was taken by depositions in the main case." The injunction was dissolved in part by the District Court at the hearing on the merits, and wholly so on appeal to this court. Judgment was rendered by the District Court in favor of the defendants, and plaintiffs appeal.

Brown, Stone & Sears and Boardman & Williams, for appellants.

Henderson & Norton and Caswell & Meeker, for appellees.

SEEVERS, Ch. J.—I. After the introduction in evidence of the bond, petition, injunction and record showing a dissolution of the injunction at the final hearing, it was ^{1. INJUNCTION: action sought to prove what services were rendered by upon bond: damages.} counsel for plaintiffs in regard to the dissolution of the injunction, and what efforts had been made to have the motion to dissolve the injunction heard by the court, and whether the court in substance declined to hear it. While the plaintiffs sought to prove much more, yet we are of the opinion that in some of the questions asked the testimony sought to be elicited was limited to what was done by counsel for plaintiffs with reference to the motion to dissolve as distinguished from what was done in the preparation of the cause for final hearing, and what was done at that time. In this belief we are confirmed by the argument of counsel. On the one hand it is claimed that the plaintiffs cannot recover anything, for the reason that the injunction was dissolved on final hearing, and that there could be no separate counsel fees, for the reason that the motion to dissolve was never brought on for hearing; and on the other hand, it is insisted it makes no difference when or how the injunction was dissolved, that plaintiffs are entitled to recover counsel fees.

Wallace v. York.

The injunction was not independent, but auxiliary to other relief asked in the petition. If the injunction had been dissolved, the action would not have been ended, but the plaintiffs could have issued an execution and made efforts to have collected their judgment.

It was held in *Behrens v. McKenzie*, 23 Iowa, 333, that a reasonable compensation for counsel fees, in obtaining the dissolution of an injunction, might be recovered as damages, in an action on the bond, but not for defending the entire action. And in *Langworthy v. McKelvey*, 25 Iowa, 48, it was held that "attorneys' fees, paid for legal services in procuring the dissolution of the injunction," could not be recovered in an action on the bond, because it appeared the injunction was dissolved "upon hearing and adjudication of the case, and not upon a motion to dissolve, nor otherwise than upon a defense to the suit on its merits."

This case is not conclusive upon the question presented in the case at bar, for the reason no motion to dissolve was filed, or any effort whatever made looking to a dissolution, except by a hearing on the merits.

In *Andrews v. Glenville Woolen Co.*, 50 N. Y., 282, a motion was made to dissolve the injunction, "which was denied, the court declining to inquire into the merits until the final hearing," and it was held that the "expenses of the motion to dissolve, and a counsel fee on the trial," could be recovered in an action on the bond. In this case it was clearly and distinctly shown that the court declined to inquire into the merits until the final hearing. In the case at bar an averment of that character does not so distinctly and clearly appear. But, in the absence of a motion for a more specific statement, we are of the opinion the petition is sufficient in this respect; otherwise it could not be said, "the motion was not finally decided by the court, because the same evidence was taken by depositions in the main case."

The motion could not be determined without an inquiry into the merits, and in this respect the case is identical with *Andrews v. Glenville Woolen Co.*, *supra*. It was right and proper to file the motion to dissolve, and make preparation to

Conable v. Lynch.

sustain it by affidavits, and if done in good faith for the purpose of procuring a dissolution, and the court declined to hear it, we are of the opinion, for the services of counsel in the preparation of the motion, separate and apart from the fees of the counsel in the preparation and trial of the main action, there may be a recovery in this action. If the motion was not filed in good faith or called up and a ruling thereon in good faith sought, then there can be no recovery. If the plaintiffs paid anything to officers as fees for swearing affiants to the affidavits and the same have not been taxed as costs in the original case and paid, such fees would come within the rule above stated. But the plaintiffs should not be allowed anything for time spent in making affidavits.

The objection that the petition is not sufficient to warrant the introduction of any evidence is not well taken.

As the case is presented in the abstract before us, we are of the opinion the plaintiffs were entitled to recover something; it was, therefore, error to reject at least a portion of the evidence offered.

REVERSED.

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45 84
102 40

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1118 597
45 84
119 427

CONABLE v. LYNCH.

1. **Principal and Agent: CONDITIONAL SALE.** A party who is authorized to sell goods for another, under a written contract not recorded, and is bound by the terms thereof to turn over the proceeds, whether in cash or notes, to his principal, and after a certain specified date to become liable for the payment of any unsold goods remaining in his possession, does not prior to that date hold the goods under a conditional sale, nor can a purchaser insist upon an off-set of any claim he may hold against the agent.

Appeal from Buchanan Circuit Court.

MONDAY, DECEMBER 11.

This cause was tried in the court below without a jury. The court made special findings of fact to which no exceptions were

Conable v. Lynch.

taken. There was a judgment for plaintiff, and defendant appeals, claiming that the conclusion of law based upon the facts found is erroneous.

Bruckart & Ney, for appellant.

Jamison & Begun, for appellee.

ROTHROCK, J.—From the findings of fact it appears that one H. S. Berry, on the 25th day of January, 1876, entered ^{1. PRINCIPAL} into a written contract with the plaintiff to sell for ^{and agent:} him certain agricultural machinery. Said contract ^{conditional} ^{sale.} was not recorded nor filed for record. Under the contract Berry received and took into his possession a wagon together with other property. Berry had borrowed of the defendant herein the sum of \$138, and representing to defendant that he owned the wagon desired to sell the same, and the defendant believing said representations to be true bought the wagon, giving Berry credit therefor in the sum of \$85. Berry soon after left the State.

Plaintiff demanded the wagon of defendant, who refused to deliver it up. Whereupon plaintiff instituted this suit in the form of replevin, and the question is as to the ownership of the wagon.

A determination of the rights of the parties depends upon the proper construction to be given to the contract between the plaintiff and Berry. The court below held that it was a contract of agency, and appellant insists that it was a conditional sale.

The contract states that Berry is the agent of Conable in the sale of the property, and it is agreed therein that Conable shall ship machines to Berry, and that he shall sell them to such persons only as are perfectly responsible, and take notes for deferred payments, and indorse and guarantee the payment of each note so taken. The notes were to be sent to plaintiff as the machines were sold, and the proceeds of all cash sales were to be promptly remitted to plaintiff, less the discount due Berry as his compensation.

The contract was to exist until the 1st day of August, 1875.

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The clause of the contract which appellant relies on as showing a conditional sale of the property is in these words:

"And the said party of the second part hereby guarantees the sale of all the machines embraced in this agreement, the meaning and understanding of this guarantee being that in case these machines are not all sold during the continuance of this contract, then the party of the second part will make payment of such unsold machine, either in the notes of responsible farmers due at the dates, and indorsed and guaranteed in the form as hereinafter specified, or in other valuable consideration, at the option of the party of the first part; but all the machines shall remain the property of the said E. B. Conable, until so paid."

Defendant purchased the wagon of Berry about the 1st of July, 1875, while the contract in question was in full force, and while Berry was selling the property not on his own accounts but as the agent of plaintiff. He could only sell for cash or for notes on responsible parties, the payment of which he was bound for by his guarantee, and the cash and notes were to be immediately delivered to plaintiff. He had no right to sell the property in payment of his own debts.

The effect of the clause of the contract in question was this: Berry was to continue to sell the machines and property until the 1st of August, 1875, as the agent of plaintiff, and any that might remain unsold at that date he was to take and pay for in notes, or in other valuable considerations.

If the sale to appellant had been made after the first of August, being after the time Berry was authorized to sell as agent, we believe the position of appellant's counsel would be correct. Berry would then be holding the property under a conditional sale, and, under section 1922 of the Code, an innocent purchaser from him would be protected. It was only such of the property as might remain unsold, which was to be paid for by the agent and then become his property.

AFFIRMED.

Starr v. The City of Burlington.

STARR v. THE CITY OF BURLINGTON.

1. **Municipal Corporations: MANDATORY ORDINANCE: JURISDICTION.** It is competent for a city to prescribe by ordinance the manner in which jurisdiction may be acquired over particular subjects, and if the requirements of the ordinance are mandatory, an act of the city without acquiring jurisdiction in the manner prescribed is void.
2. _____: _____: IMPROVEMENT OF STREETS. An ordinance directing that improvements in streets shall be ordered by resolution describing the streets and improvements, and that notice shall be given by the publication of the resolution, is not directory but mandatory.
3. _____: _____: _____. The receipt and reference to the proper committee of a petition asking that the improvements be made, a resolution directing the committee to advertise for and receive bids, and another resolution directing them to contract with the lowest bidders for the performance, did not constitute a compliance with such an ordinance and did not confer upon the city jurisdiction to make the improvement and subject an adjacent property holder to liability therefor.
4. _____: _____: ESTOPPEL. The proceedings for the levy of the assessment being without jurisdiction and void, the property holder is not estopped to deny their validity by the fact that he made no objection while the improvement was in progress.
5. _____: RECOVERY FOR IMPROVEMENTS: SPECIAL CHARTERS. Prior to the taking effect of the Code, a city organized under a special charter could not recover from the owners of lots the cost of improvements of adjacent streets, notwithstanding any irregularity or defect in the proceedings under which the work was ordered.
6. _____: IMPROVEMENT OF STREETS: SCOPE OF STATUTE. The proceedings under which the improvement was ordered having taken place and the contract for the work been made prior to the time when the Code took effect, they will be governed by the statute then existing, and the provisions of the Code will not apply.
7. **Practice in the Supreme Court: ABSTRACT: EVIDENCE.** Where the appellee has filed an amended abstract, which contained evidence alleged to have been omitted in the abstract submitted by appellant, he will not be permitted to maintain that all the evidence in the case is not before the court.

Appeal from Des Moines District Court.

MONDAY, DECEMBER 11.

Action in chancery to restrain the city of Burlington from selling a lot owned by plaintiff, upon an assessment made

45	87
78	941
45	87
105	468
45	87
112	305
112	611
45	87
114	602
45	87
118	722
45	87
138	820
45	87
139	604
45	87
144	630

Starr v. The City of Burlington.

thereon for macadamizing an adjacent street. The defendant filed an answer and cross-bill alleging the street was improved under proper and lawful action of the city directing the work to be done and the cost thereof to be assessed upon the property, and praying that the value of the improvement may be charged against plaintiff, and a personal judgment rendered against him therefor. A decree was entered dismissing plaintiff's petition, and judgment was rendered for the cost of the improvement, which was made a lien upon the lot. Plaintiff appeals.

C. E. Starr and Powers & Antrobus, for appellant.

S. K. Tracy, for appellee.

BECK, J.—Under an ordinance of the city of Burlington its council are authorized, upon a petition of the resident owners of property abutting upon a street, to order it to be macadamized and otherwise improved, the cost thereof to be assessed upon the real property abutting upon the part of the street so improved. The third section of this ordinance provides that, "the manner of making such improvement, * * * * * and of assessing and collecting the expense thereof, and all proceedings in relation to the same, shall be the same as now provided by ordinance No. 27," etc. The ordinance 27 provides that, "it shall be lawful for the city council, by resolution describing the street, avenue, etc., or other place to be improved, and the character of the improvement, to order and direct such improvement, and require the cost and expense thereof to be levied and assessed as a special tax upon the lots and parcels of ground, or any part of either, fronting or lying along the street, etc., to be improved, which said resolution shall be published at least once with other council proceedings."

I. The ordinances, in terms, require the work to be ordered by a resolution to be published in the manner prescribed. The city, by its ordinance, having prescribed these proceedings, must pursue them in order to bind the property holder and render him liable for the cost of the work. The city can-

Starr v. The City of Burlington.

not be exempted from the duty of obeying its own laws. It has prescribed the steps to be taken which will give it jurisdiction to levy assessments. These indicated in the parts of the ordinances above quoted, are, 1. An order for the work in the form of a resolution; 2. The publication of this order. The first calls into exercise municipal authority, under which the improvement is to be made, and is the expression of the legislative will of the city applied to the subject of this authority, the improvement of the street in question; the second is the means of communicating to the people a knowledge of the exercise of municipal authority which is necessary to bind the persons to be affected thereby. The ordinances quoted provide for the manner of municipal legislation in the exercise of authority conferred by the city charter. The citizen cannot be bound unless the authority be exercised in the manner prescribed.

It is competent for the city, when not inconsistent with restrictions of its charter, by ordinance to prescribe the steps 1. **MUNICIPAL** to be taken in order to acquire jurisdiction over corporation: mandatory particular subjects. If these steps are not taken, ordinance: jurisdiction. and the requirements of the ordinance are mandatory, the act of the city in an attempt to exercise authority will be void. *The City of Dubuque v. Wooton*, 28 Iowa, 571; Dillon's Mun. Cor., §§ 610, 643, 245.

In the case before us, the requirements of the ordinance quoted, to the effect that the improvement of streets shall be 2. —: —: ordered by resolution describing the streets and improvement of streets. the improvement, cannot be regarded as simply directory, for the reason, as we have seen, such resolution is the very act whereby the city acquires jurisdiction. Neither is the requirement that notice be given, by the publication of the resolution, directory. Both of these requirements are mandatory. *City of Dubuque v. Wooton, supra*.

II. Having announced this well settled doctrine, we will consider the facts which render it applicable to the case before us.

The record fails to show a resolution ordering the work, as

Starr v. The City of Burlington.

required by the city ordinances; no such resolution was
3. —: —: adopted by the city council. There was, of course,
no publication, as required in such cases. The
action of the city council upon the subject was confined to the
receipt and reference to a proper committee of a petition of
property holders asking that the improvement be made; a
resolution directing the proper committee to advertise for
and receive bids for the work; the receipt and opening of bids
and their reference to a committee, and its report; a resolution
directing the committee to enter into a contract with the low-
est bidder, and that the cost of the improvement be assessed
to the property abutting thereon, and other proceedings affect-
ing the contractor. It cannot be claimed that these acts, or
any of them, are in substance or effect an order for the work
by resolution describing the streets and the improvements to
be made. The city, therefore, failed to acquire jurisdiction of
the subject upon which it attempted to exercise authority, and
plaintiff and his property are not bound by its action.

III. As the proceedings for the levy of the assessment
upon plaintiff's property are void—were without jurisdiction
4. —: —: from the very beginning, he is not estopped to
deny their validity on the ground that he made
no objection to the proceeding while the improvement was in
progress. As to mere irregularities, when jurisdiction in
such a case is acquired, he would be estopped by his silence to
object thereto. *Patterson v. Baumer*, 43 Iowa, 477. The
rule does not extend to the case of improvements made with-
out jurisdiction therefor having been first acquired.

IV. It is argued that defendant may recover of plaintiff the
reasonable value of the improvement under Code, § 479, which
5. —: re- authorizes recovery in an action brought under
covery for im- provisions of preceding sections by a city
provements: special char- against owners of lots for the cost of improve-
ters. ments of adjacent streets "notwithstanding any informality,
irregularity or defect" in proceedings under which the work
was ordered and performed. The last sentence of the section
makes the provision applicable to cities acting under special
charters. But this sentence is not found in the section as it

Starr v. The City of Burlington.

appears in the Revision; it is an original provision introduced by the Code.

The section as it stood in the Revision is applicable to municipal corporations organized under the general statute of the State, being a part of that enactment. The city of Burlington, when the proceedings involved in this case were had and the work was completed, was a municipal corporation chartered by a special statute. The work was completed on or before the 29th day of December, 1873, and, of course, all proceedings of the city council relating thereto were had prior to that date. The city on the 8th of March, 1875, abandoned its special charter and was organized under the general incorporation statute.

It cannot be claimed that the section in question, as it stood in the Revision, being a part of the general incorporation law under which cities may be organized, and applicable to proceedings had by such cities, can be applied to cities existing under special charters for the simple reason that proceedings of the last named cities are not of its subject. There are no words in the statute which extend its provisions to the acts of cities organized under special statutes.

V. We are next to inquire whether the provisions of the section as it stands in the Code are to be extended to the proceedings involved in the case before us. These proceedings were had and the contract for the work was made prior to September 1, 1873, when the Code took effect. The position of defendant's counsel, that the clause making the section applicable to proceedings of cities existing under special charters extends the provision to this case, if sustained, would give the part of the section originally introduced by the Code retroactive effect. The proceedings in question were had and the rights of parties involved in this action accrued before the clause of the statute, upon which defendant relies to support his position, was enacted. If the proceedings and rights involved in this case constitute a proper subject for retrospective legislation, the statute will not be so construed as to affect them in that character, unless an intention of the legislature clearly appears to

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give it that operation. *State v. Squires*, 26 Iowa, 340; *Bart-ruff v. Remey*, 15 Iowa, 257; *Forsyth v. Ripley*, 2 G. Greene, 181; *Davis v. O'Ferrall*, 4 G. Greene, 168. But no such intention appears either expressly or by implication. The provision under consideration must, therefore, be so construed that it will have prospective operation only. It is not, for this reason, applicable to the proceedings involved in this case.

VI. It is claimed by defendant's counsel that the abstract of plaintiff, upon which the cause is submitted, does not present all the evidence and that, therefore, the questions of fact presented in the case cannot be determined by us. In answer to this position it is sufficient to say that, while the abstract of plaintiff is defective in not avering that all the evidence is presented therein, the defendant filed an amended abstract to supply omissions made by plaintiff, without claiming that, with the parts of the records so supplied, the case would not be fully presented and the evidence would not be all before us. Defendant's amended abstract contains certain evidence alleged to be omitted by plaintiff. After the filing of the amended abstract with the alleged omitted evidence, we must consider the testimony all before us. The defendant will not be permitted to set up, after claiming to supply by an amended abstract parts of the evidence which as alleged was omitted by the other party, that we have not all the evidence before us. The plaintiff could well rely upon the amended abstract as presenting all the evidence which the defendant deemed necessary to be brought to our attention, and would be thus induced, if he discovered any omission, to forbear supplying it. The judgment of the District Court is

REVERSED.

Butler v. St. Louis Life Ins. Co.

BUTLER v. ST. LOUIS LIFE INS. CO.

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123	364

1. **Evidence: INSANITY: HEARSAY.** The physician's certificate, prepared from the statements of relatives and friends of a patient in the insane asylum, is not competent evidence to show what had been the mental condition of the patient previous to his confinement in the asylum.
2. ——: ——: **RECORDS OF PUBLIC INSTITUTION.** The records of a public institution must be shown to have been kept in compliance with the laws of the institution before they are admissible in evidence, and the laws themselves must be introduced to establish the fact.
3. ——: ——: **OPINION OF WITNESS.** The opinion of a witness who is not an expert, respecting the sanity of a person, is competent where he states all the facts upon which his opinion is founded.
4. ——: ——: **EXPERT.** In the trial of an issue of insanity, it is not competent for a medical expert to give his opinion respecting the testimony which has been introduced in the case, but the inquiry should be limited to his conclusion respecting the facts.

Appeal from Des Moines District Court.

MONDAY, DECEMBER 11.

THIS is an action upon a life insurance policy, insuring the life of Jacob Butler, plaintiff's deceased husband. The petition, which is in the usual form, alleges that the insurance was effected in 1864, that all premiums were paid up to the time of the death of said Butler, which occurred in 1874.

The policy contained a clause in these words: "And it is also understood and agreed to be the true intent and meaning hereof, that if the proposals, answers and declarations made by the said Jacob Butler, and bearing date June 29, 1864, and which are hereby made part and parcel hereof as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void * * *."

The application for insurance contained the answers and declarations referred to in the policy, and among other interrogatories propounded there is one in these words:

"Int. 14. Has the party ever been subject, since childhood, to rupture, insanity, aberration of mind, bronchitis,

Butler v. St. Louis Life Ins. Co.

general debility, paralysis, cholic, fistula, apoplexy or palpitation, fits, dropsy, asthma, liver complaint, gout, consumption, aneurism, spitting of blood, and which?"

To this interrogatory the answer was "No."

The application also contained the following question:

"26. Is the party aware that any untrue or fraudulent allegation, made in effecting the proposed assurance, or any concealment of facts in regard to his or her health, habits or circumstances, or neglect to pay premium when it becomes due, will violate the policy, and forfeit all payments made thereon?"

To this interrogatory the answer was "Yes."

At the end of the specific interrogatories propounded and answered was the following:

"The assured will answer definitely for the information of the directors, in order that they may determine understandingly on the application, any circumstances or facts in relation to the present and past state of health of _____, and which circumstance is not included in the foregoing statement."

To this no answer or statement was made by the assured. A waving line was drawn through the blank left for such answer or statement, and the name of the applicant was signed below.

The said application also contained the following statement:

"That my age, next birth day, will be forty-seven years; and that I am now in good health, of sound body and mind, of sober and temperate habits, and do usually enjoy sound health, and that I do not nor will I practice any habits that tend to the shortening of life, and that the following answers and annexed statements are correct and true, in which I have not concealed, withheld or misrepresented any material circumstance in relation to the past or present state of my health, habits of life, or condition, which may render assurance on my life more than usually hazardous, or with which the directors of said company ought to be made acquainted. And I do hereby agree that the preceding answers given to the annexed

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questions, and the accompanying statements and this declaration shall be the basis, and form part of the contract or policy between myself and the said company, and that if the same be not in all respect true and correctly stated the said policy shall be void, and all moneys which may have been paid on account thereof, and every benefit which may accrue therefrom, shall be forfeited to said company. * * *

"(Signed,) "

JACOB BUTLER."

The answer admits the execution and delivery of the policy, the payment of premiums and the death of the assured, and sets up two defenses in substance as follows:

1st. It is alleged that the answer to the fourteenth interrogatory is untrue in this, that said Jacob Butler had been subject since childhood to insanity and aberration of mind, for that on the 29th day of June, 1847, he was sent to and received in the Central Ohio hospital for the insane as a patient for treatment, and was there for twelve weeks treated for insanity and aberration of mind.

2d. That in said application the said Jacob Butler did, among other things, declare that the answers following and the statements annexed were correct and true, in which he had not concealed or withheld or misrepresented any material circumstance in relation to the past or present state of his health, habits of life or condition which might render an insurance on his life more than usually hazardous, or with which the directors of said company ought to be made acquainted; and that the said Butler did conceal, withhold and misrepresent, a material circumstance in the past state of his health, which did render an assurance on his life more than usually hazardous, and with which the directors of said company ought to be made acquainted; in this, that said Butler in said answers and statements did conceal, withhold and misrepresent the fact that on the 29th day of June, 1847, he was sent to and received in the Central Ohio hospital for the insane, and was there for a period of twelve weeks treated for insanity and aberration of mind.

Upon these issues there was a trial by jury. Verdict and judgment for plaintiff, and defendant appeals.

Butler v. St. Louis Life Ins. Co.

P. T. Lomax and Craig & Collier, for appellant.

Hanna & Fitzgerald and Hall & Baldwin, for appellee.

ROTHROCK, J.—I. Upon the trial the defendant admitted the execution of the policy for the use and benefit of plaintiffs, and the delivery of the same to Jacob Butler in his lifetime, and due notice and proof of the death, and the payment of all premiums due the company up to the date of the death of said Butler, and took the affirmative of the issues joined between the parties.

It appears from the record before us that Jacob Butler was admitted as an insane patient in the Iowa Hospital for the insane, at Mount Pleasant, a short time before his death. It was conceded on the trial, by plaintiff, that he was legally and formally admitted as an insane person.

The defendant introduced as a witness Mark Ranney, present superintendent of the hospital for the insane, at Mount Pleasant, who produced the admission papers, ^{1. EVIDENCE: Insanity:} which defendant offered in evidence. Objection was made to the introduction of the questions and answers appended to the "physician's return," which was sustained, and defendant excepted and assigns this ruling as error.

We think the questions and answers referred to were properly excluded. Sec. 1400 of the Code provides that the physician "shall endeavor to obtain from the relations of the person in question, or from others who know the facts, correct answers so far as may be to the interrogatories * * *."

The answers, then, are mere hearsay and not competent to show insanity at a previous date. Their introduction must have been sought for this purpose, for the plaintiff conceded that the deceased was insane at the date of his admission to the hospital at Mount Pleasant.

II. The defendant sought to introduce the record of the Iowa hospital for the insane, so far as it related to the deceased.

^{2. —: —:} This was objected to and excluded. It appears ^{records of public institution.} that the records in question were in the handwriting of an assistant physician. It is not shown

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that the record was kept pursuant to any authority or by officers in the performance of any duty. A witness stated that the record was required by the by-laws, but such by-laws were not produced, and could not be proved by parol evidence. What the record contained which was material to the case we cannot determine, as no statement is made of its contents.

III. Exceptions were taken to certain interrogatories propounded by plaintiff's counsel to A. M. Hare, Rev. A. D. 3. —: Robbins, and to the plaintiff, as to the mental ^{opinion of} witness condition of the deceased. We are unable to determine from the appellant's abstract to what time these interrogatories referred or to what extent these witnesses were examined as to the facts upon which their opinions were based. There is an additional abstract in which it is claimed they were examined at length, showing a long and intimate acquaintance with deceased. Whether these witnesses narrated to the jury all the facts as to the conduct, appearance, health and conversation of the deceased, upon which they based their opinions, we cannot determine from the record. If they did, there was no error in permitting them to give an opinion founded on such facts. *Pelamourges v. Clark*, 9 Iowa, 1; *The State v. Stickley*, 41 Id., 232; Redfield on Wills, vol. 1, p. 137, *et seq.*.

IV. There was evidence introduced which tended to prove that the deceased was insane in the year 1847, and 4. —: that he was taken by his friends to the Ohio expert lunatic asylum, and that on June 29, 1847, he became an inmate and patient of said asylum and was therein treated for insanity. The plaintiff introduced one R. J. Patterson as a witness, who testified that he was first medical assistant in the Ohio insane asylum from 1842 to the close of 1847; that he remembered Jacob Butler well, and that he was not insane when in the Ohio asylum; that he was admitted informally, without the usual and legal examination or certificate, and was there for physical treatment, owing to the fact that his father was an employe at the institution; that Butler was unrestrained, at liberty to come and go, and was not regarded as an insane patient.

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After giving his opinion as to Butler's sanity, based on his personal observation and treatment, in answer to certain questions propounded to him he stated that he had heard all the testimony that had been given in the case. Plaintiff's counsel then propounded to said witness the following questions:

Int. "I will put this question. In view of the testimony as you have heard it, and in connection with your own knowledge of the state of Mr. Butler at the time he was in the asylum in 1847, in your opinion, was he or not, at that time, insane?"

Ans. "That opinion I have already expressed—that he was not insane—based upon my own personal knowledge."

The Court:—"He is giving you a hypothetical case."

Int. To the same as before. "I want the opinion now, with your own individual observation, from what has reached you in the testimony?"

Ans. "The testimony has not served to induce me to change my opinion already expressed."

These questions and answers were properly objected to by defendant. Objections overruled, and this action of the court is now assigned as error. It is not disputed that the witness was a medical expert. His opinion, based on his personal observation and treatment, was given without objection. Indeed, as it appears to us, he was a most important witness in the case. His learning, age and experience, entitled his opinion to great weight. We have each examined the question arising upon this assignment of error with care, and are forced to the conclusion that the ruling of the court was prejudicial error. The interrogatories to be put to an expert are not as to what his opinion is of the testimony, but what is his opinion, if the *facts* are as stated to him by the questioner.

Of course the hypothetical question thus stated should be based on the testimony. We might hold the ruling correct if the questions had been put conceding the testimony to be true, or in some way indicating that the witness was not left to give his opinion of the testimony. As it is, we are unable to determine from Mr. Patterson's testimony whether he believed that the witnesses as to Butler's insanity were mis-

The State v. Adams.

taken in what they observed, or whether he accepted the facts as proven and still was of opinion Butler was not insane in 1847. 1 Greenleaf on Ev., Sec. 440; *Phillips v. Starr & Co.*, 26 Iowa, 349; *The State v. Felter*, 25 Id., 67.

As the judgment must be reversed for the error last above discussed, it is unnecessary that we should review the alleged errors based upon the instructions to the jury.

REVERSED.

THE STATE v. ADAMS.

1. **Citizen: REMOVAL FROM COUNTRY.** Removal from the country and residence under another government for a period of years does not deprive one of his citizenship in this country.
2. **— : CITIZENSHIP OF A CHILD.** The citizenship of the child is determined by that of the father, and though the latter reside in another country the child will be a citizen of this if the father has not forfeited or surrendered his allegiance thereto.
3. **— : MILITARY SERVICE.** Involuntary military service in a foreign army by a citizen of this country, and the acceptance of a bounty therefor, does not have the effect to deprive him of his citizenship here.

Appeal from Pottawattamie Circuit Court.

MONDAY, DECEMBER 11.

THIS is a civil action by ordinary proceedings, brought for the purpose of testing the right of defendant to hold and exercise the duties of the office of mayor of the town of Avoca. There was a trial to the court, a finding in favor of defendant, judgment, and plaintiff appeals.

John Scott and Montgomery & Scott, for appellant.

Sapp & Lyman, for appellee.

SEEVERS, CH. J.—The right of the defendant to hold the office in question depends upon the fact whether or not he was a citizen of the United States and State of Iowa. The Circuit Court made the following finding of facts:

“1st. That the defendant’s paternal grandfather was born

The State v. Adams.

in Connecticut in the year 1764, and from there emigrated to Canada, in the year 1790, with the intention of making Canada his permanent domicile, and that he remained in Canada until his death in the year 1838.

2d. That the defendant's father was born in Canada in the year 1795, and resided there until the year 1834.

3d. That the defendant was born in Canada in the year 1834, and during the same year came with his father to the United States, where they have ever since resided.

4th. That the defendant has resided in the State of Iowa ever since its admission into the Union, and in the town of Avoca for the two years last past.

5th. That the defendant's father, while a resident in Canada, served in the Canada militia in the war of 1812, but that such services were involuntary on his part.

6th. That in the year 1875 the defendant's father received of the Canadian government a bounty of \$20 for such services.

7th. That neither the defendant or his father has ever been naturalized under the laws of the United States for the naturalization of aliens."

In the absence of any evidence it cannot be presumed the defendant's paternal grandfather adhered to the British Government during the revolutionary war, nor can it be presumed he intended by his removal to Canada and making his permanent domicile there to renounce his citizenship in this country. From the facts before us alone must this question be determined.

The doctrine of the American courts seems to be that all persons domiciled in this country on the 4th day of July, 1776, and who remained here after the treaty of peace in 1783, became citizens. If a person was domiciled here on the 4th day of July, 1776, and adhered to the British Government, and left the country before the treaty of peace, and thereafter remained abroad, he did not become a citizen. In other words, between the above periods the question of citizenship depended on the intention, and during that period the right of election existed. The English courts have held that

The State v. Adams.

the right of citizenship did not attach until the treaty of peace in 1783, and that all persons domiciled here at that period became citizens.

It matters not in this case which rule is adopted. By the common law allegiance is not a matter of individual choice. It attaches at the time and on account of birth, and under circumstances in which the family owe allegiance and is entitled to protection. A person may be domiciled in one place or country, and owes allegiance to and be a citizen of another. The fact that plaintiff's grandfather made his permanent domicile in Canada does not of itself prove him to be an alien. Even if he was regarded as a British subject, this would not necessarily make him an alien. The laws of the United States determine what persons shall be regarded as citizens, irrespective of such persons' pleasure or the laws or pleasure of any other government.

For aught that appears, plaintiff's grandfather never intended or desired to become a citizen of Canada. His having his permanent domicile there, at least, is not sufficient to prove such intention.

We are of the opinion that defendant's grandfather, at the time he removed to Canada, in 1790, was and had been for 1. CITIZEN: several years a citizen of this country, and that he removal from remained such notwithstanding his removal to and subsequent death in Canada. In this conclusion we are sustained, we think, by the following authorities: *Calais v. Marshfield*, 30 Maine, 411; *Peck v. Young*, 26 Wend., 612; *Inglis v. Trustees Sailor's Snug Harbor*, 3 Peters, 99.

The father of plaintiff was born in Canada, in 1795, at which time his father as we have seen was a citizen of this 2. ____: citi- country. Ordinarily the citizenship of the child zenship of child. at its birth is determined by that of the father. If there be a doubt as to this principle, it must be regarded as removed by the Act of Congress passed in 1802, which provides, * * "Children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof." Revised Statutes United States, § 2172.

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This language clearly and unmistakably includes the plaintiff's father, and he thereby (if not otherwise) became entitled to all the rights of citizenship.

The involuntary part he took in the war of 1812, and the acceptance of a bounty therefor from the Canadian government, long after he became domiciled in the United States, is not sufficient to deprive him of the rights conferred by the act of Congress.

In *Calais v. Marshfield, supra*, the person whose citizenship was contested while domiciled in New Brunswick became the owner of a farm, performed military duty, and held the office of surveyor of highways, and also voted there, his right never having been questioned. These several acts were voluntary, while in the case at bar nothing of this kind appears, except the acceptance of the bounty as some compensation for an involuntary act.

Without further enlarging upon this question, we conclude that plaintiff at the time of his election was a citizen of the United States, and of the State of Iowa, and entitled to hold the office in question.

AFFIRMED.

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93 387

45 102
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WILLIAMS v. BROWN ET AL.

1. **Evidence: WHEN EXECUTOR IS A PARTY.** In an action upon a promissory note by the executors of the assignee of the note, wherein the defendant averred that the alleged assignee was really the agent only of the payee, and that he had made payment to the agent, it was held, that the court might, in a trial without a jury, exclude the testimony of the defendant in support of his averment.

Appeal from Johnson Circuit Court.

MONDAY, DECEMBER 11.

THIS is an action brought upon a promissory note made by appellants, and payable to Edsal Roup or bearer. It is alleged in the petition that the payee transferred said note before maturity, and that it is now the property of plaintiffs in their

Williams v. Brown.

official capacity as executors of the estate of John Williams, deceased.

The answer admits the execution of the note, and as matter of defense alleges that John Williams, at the time of making the note, was the agent of payee, and as such agent loaned to M. Brown the sum mentioned in the note, and took the note as evidence of the indebtedness, appellant, William Wolf, being surety; that said Brown paid to said Williams as such agent the full amount of said note; that this action is brought in the name of the executors, with the fraudulent intent of preventing defendants from testifying as witnesses; that the supposed cause of action, if any there is on said note, accrued to Edsal Roup, and not to plaintiffs.

There was a trial by the court; judgment for plaintiffs, and defendants appeal.

Fairall & Bonorden, for appellants.

Edmonds & Younkin, for appellees.

ROTHROCK, J.—I. On the trial of the case the plaintiffs having the note in their possession introduced it in evidence and rested. In order to defeat recovery thereon, the defendants sought to establish, first, that the note was in fact the property of Roup, the payee, and second, to show by the testimony of appellants that it was paid to Williams in his lifetime. If the evidence was not sufficient to establish the first proposition, the second could not be shown by the testimony of the defendants. Code, Sec. 3639. It is conceded that such testimony would be in the nature of a personal transaction between the witnesses and the deceased.

After the evidence as to the ownership of the note was introduced, defendants offered to show by the evidence of ^{1. EVIDENCE:} Brown, one of the defendants, that the amount ^{when execu-} ^{is a party.} due on the note was paid to Williams in his lifetime. Objection was made to this evidence, which was sustained, and the defendants assign this ruling of the court as error.

We do not concur in the proposition of appellants' counsel,

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that it was sufficient for defendants to make merely a *prima facie* showing that Williams was the agent of Roup in loaning the money, and that the note in question was in fact the property of the latter, in order to allow Brown to testify that it was paid to Williams. This proposition might be correct if the case had been tried by a jury. It would have been the province of the jury to determine both questions, and the court could not know in advance how the question of agency and ownership would be determined, and might very properly have allowed the payment to Williams to be shown.

But, as the trial was to the court, unless the finding as to the agency and ownership is so manifestly against the evidence as to demand a reversal on this ground, there was no error in excluding the evidence of Brown.

We have each carefully examined the evidence on this question, and while we may say we are of opinion that as it appears to us the finding might well have been otherwise, yet, under the rule well established here, we cannot interfere. We must treat the finding the same as though it were the special verdict of a jury on that question.

It is unnecessary to detail the evidence here.

AFFIRMED.

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89 408
45 104
110 706

THE DISTRICT TOWNSHIP OF VIOLA v. THE DISTRICT TOWNSHIP
OF AUDUBON.

1. **School Districts: DIVISION OF TERRITORY: ASSETS.** When a part of the territory of one school district is attached to that of another, the boards of directors of the two districts or arbitrators chosen by them shall apportion the assets upon the re-organization of the districts, and their jurisdiction for this purpose is exclusive.

Appeal from Audubon Circuit Court.

MONDAY, DECEMBER 11.

IN March, 1874, there was a re-organization of school districts, and a portion of the territory theretofore forming a part of the defendant was attached to and became a part of the

The Dist. Township of Viola v. The Dist. Township of Audubon.

plaintiff, and this action is brought for the purpose of obtaining a division of the assets.

The cause was referred, and upon the coming in of the report the court rendered judgment thereon, and the defendant appeals.

John W. Scott, for appellant.

H. W. Hanna, for appellee.

SEEVERS, Ch. J.—That there may be a division of the assets upon the re-organization of school districts, and also the tribunal by whom such division shall be made, is prescribed by statute. Section 1715 of the Code provides: 1. That the old board of directors shall act for both the old and new districts until the latter elects a board. 2. The respective boards of the new and old districts shall then make an equitable division of the assets; and 3. In case of their failure to agree, the matter shall be decided by arbitrators chosen by the parties in interest.

The petition states that no division has been made, and that defendant refuses to arbitrate or make any division of the assets. This is denied in the answer, and the referee failed to make any finding in reference thereto.

The respective boards of directors are yet in existence, and, therefore, this case is distinguishable from *The Independent School District of Georgia v. The Independent School District of Victory*, 41 Iowa, 321. While this is true, it seems to have been the opinion of BECK, J., if not of the court, in that case, that a special tribunal having been created by statute, clothed with power to make a division of assets between the old and new organizations, the jurisdiction of such tribunal was exclusive during its existence. This seems to us to be the reasonable and proper view. It is eminently just that the division should be made by the local tribunal appointed by law. It must be an equitable division in view of all the circumstances shown, and what is equitable is for such tribunal to determine. It would seem that the General Assembly had, without doubt, intended that an appeal to the courts

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should not be had. It is true, if the local tribunal declines to act, that the courts by *mandamus* will compel such action, but cannot dictate what is an equitable division of the assets.

This jurisdictional question was not raised in the court below, nor has it been in this court; but consent never gives jurisdiction over the subject matter, and it may and should be raised by the court at any stage of the proceedings.

Especially is this true in this character of action, for we would not even by implication sanction a resort to the courts in cases of this kind, unless the tribunal appointed by law had ceased to exist and there was no other remedy.

The judgment below will be set aside and the cause remanded with directions to strike the action from the docket for want of jurisdiction, unless the plaintiff can, by proper averments, so amend the petition as to constitute and make the same a petition seeking relief such as may be given in an action of *mandamus*.

The appellee must pay the costs.

APPEAL DISMISSED.

GRIMM v. WARNER ET AL.

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137 640

1. **Promissory Note: WHEN HELD AS COLLATERAL: INDORSEMENT.** Where a promissory note had been transferred by indorsement as collateral security, and then, before maturity, with the knowledge of the indorsee, the payee had sold it to a third party, into whose possession it did not come until after maturity, *held* that the latter acquired it free from equities, and occupied the position of a good faith indorsee before maturity.
2. **Contract: SALE OF GOOD WILL.** A contract for the sale of the good will of a business does not bind the vendor to abandon his trade or occupation, and he may serve as an employe of one who is engaged in the same kind of business in the same place.

Appeal from the Johnson Circuit Court.

MONDAY, DECEMBER 11.

ACTION by the indorsee of a promissory note. The defendants allege that the note was transferred after maturity, and

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set up, as a counter claim, that the payee of the note sold to the maker the good will of a certain ice business, and bound himself not to engage in the same business in Iowa City, and that he has violated this contract, whereby the makers of the note have sustained loss for which they seek to recover in this action. There was a verdict and judgment for plaintiffs in the sum of \$700. Plaintiff appeals. The further facts of the case involved in the questions of law ruled upon by the court appear in the opinion.

Fairall & Bonorden, for appellants.

Clark & Haddock, for appellees.

BECK, J.—I. There was evidence introduced upon the trial of the case in the court below, tending to show that, prior to the maturity of the note in suit, the payee indorsed it in blank and deposited it in a bank as collateral security upon a loan he had effected there; that prior to the payment of his own paper and before the maturity of the note, he sold this note to plaintiff, receiving consideration therefor. There was no indorsement or transfer of the note in writing to plaintiff, and it remained in the possession of the bank until after maturity, when it was delivered to plaintiff, the indebtedness of the maker for which it was pledged being then paid. Thereupon the plaintiffs requested the court to give the following instruction:

“3. If the jury find from the evidence that, before the note sued on was due, plaintiff, in good faith and for a valuable consideration, bought said note of the payee, and that at the time of the purchase thereof said note, indorsed in blank, was in the possession of the First National Bank of Iowa City, as collateral security for the payment of a note by Eberle given said bank, and if you find that after the said purchase, if any there was, as a part of the transaction, plaintiff and John Eberle (the payee) went together to the bank and notified its cashier of the sale of said note and said bank recognized said sale, and if you find that plaintiff paid the note due the bank although such payment was made after the maturity of the

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note sued on, you will be justified in finding plaintiff to be *bona fide* holder of the note sued, and if you so find, plaintiff is entitled to recover the full amount of said note with interest as claimed."

This instruction was refused and the following was given:

"6. If the jury believe from the testimony that the note in suit was held by the First National Bank of Iowa City as collateral, indorsed in blank by Eberle (the payee), until Jan. 22, 1875, and was then paid off and delivered to Grimm for the first time, then Grimm's right as owner or holder dates only from that time and being subsequent to the maturity of the note, the note is liable in his hands to the same defenses which it would be liable to in the hands of Eberle."

The instruction given, in our opinion, is erroneous, and the one refused presents a correct rule of law and should have been given. The principles upon which this conclusion is based will be briefly stated.

A holder of negotiable paper, to be protected against equities existing between the original parties, must have acquired it by indorsement before maturity. A transfer, except by indorsement, even before maturity carries no such consequences. *Franklin v. Twogood*, 18 Iowa, 515. The holder under a blank indorsement may transfer the paper without any further indorsement, or without filling up the blank; in that case the transferee will take it as an indorsee with all the rights of such a party. The indorsement of a promissory note to be taken as collateral security confers the legal title and property of the payee upon the holder. *Sheldon, Hoyt & Co. v. Middleton*, 10 Iowa, 17; *McCarty v. Clark*, Id., 588.

Applying these familiar principles to the case which the evidence tended to establish, we discover that, if the bank transferred the note to plaintiff upon the blank indorsement, under a *bona fide* arrangement among all the parties concerned, he acquired the legal title to the paper. If under a like *bona fide* arrangement, made before the maturity of the note, the payee had transferred all his equities and contingent interest therein to plaintiff, it is plain that he acquired thereunder the legal property in the instrument. The bank held

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the legal title and property in the note; the payee held the right in law and equity to a re-transfer to himself upon the payment of the debt for which it was held as security. This right he was authorized, *bona fide*, to transfer to plaintiff. If such transfer was made before the maturity of the paper, plaintiff would occupy the position of a good faith indorser of the bank receiving the paper in due course of business, before maturity, in whose hands it would be subject to no equity existing between the original parties thereto.

II. The note in suit was given for the purchase of certain property and the good will of a business under an instrument ^{2. CONTRACT:} ~~sale of good will.~~ executed by the payee of the note, in the following words: "For the consideration of two thousand dollars, I hereby sell, assign and transfer to Warner all my right, title and interest in and to the tools, ice-houses (two) in Iowa City, and the business and good will thereof, and I agree not to engage in the ice business in Iowa City, Iowa. January 14, 1874. (Signed) John Eberle." The answer of defendant sets up the breach of this obligation and the damages resulting therefrom, as a counter claim to plaintiff's action. There was evidence tending to prove that the payee of the note, after the execution of the contract aforesaid, was engaged as an employe of other parties in putting up ice and in conducting the ice business in Iowa City. The court instructed the jury, in effect, that this amounted to a violation of his contract, which bound him not to render personal services as an employe of other parties engaged as rivals in the ice business, and that his "personal employment in any rival business or establishment" would constitute a violation of the terms of his covenant.

The instructions presenting this rule are erroneous. It cannot be claimed that the sale of the good will of a business will bind the seller farther than that he will do no act which will interfere with the purchaser retaining the customers that, at the time of the contract, patronized the seller. He is bound to do no act which will divert the business which he transfers to the purchaser. The establishing of a new business of the same kind might have such an effect. Authorities, however,

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are to be found which hold this would not be a breach of a contract transferring good will. See *Rupp v. Over*, 2 Brews., 133; *White v. Jones*, 1 Abb. Pr. Rep. (N. S.), 328, and authorities cited. But, it is very plain, the seller will not violate his contract by serving other persons in the same business, if he had no part in bringing into existence the rival establishment. The contract for the sale of good will is not to be construed into an undertaking that the vendor shall abandon his trade, pursuit or occupation. If he may exercise it without violating his contract, he surely can take employment from any one, if he acts in good faith and does not do so for the purpose of establishing a rival business.

III. The covenant of the contract which is the foundation of defendants' claim for damages, to the effect that the payee of the note should not engage in the ice business in Iowa City, was not violated by personal services rendered by him to others, if he acted in good faith and was not interested in the business further than as an employe. He does not engage in the ice business by working for those who were so engaged. The covenant is intended to bind him not to carry on the business. The distinctions between the act of engaging in a business and of serving one who is engaged in business, are obvious and need not be pointed out.

The instructions upon this branch of the case, so far as they are in conflict with the views we have expressed, are erroneous.

Other questions presented in the argument of counsel we forbear to discuss or pass upon, as the judgment of the Circuit Court for the errors pointed out must be

REVERSED.

Easton v. Randall.

EASTON v. RANDALL.

1. **Evidence: title: admissions.** Where in an action involving title to land the one party has admitted in the abstract attached to his petition the chain of title insisted upon by the other, the latter has no need to substantiate his claim by the introduction of the patent and deeds.

Appeal from Sioux District Court.

MONDAY, DECEMBER 11.

ACTION to recover real estate. Both parties claim title; the plaintiff under a tax sale and treasurer's deed and the defendant under the patentee. To the petition an abstract of the title was attached, which showed that the United States had by patent granted and conveyed the premises to one Anderson, and that defendant acquired the title thus vested in Anderson on the 31st day of January, 1867. Said abstract further showed that the treasurer on November 12, 1872, conveyed the premises to one Ames, under and through whom the plaintiff claims. The District Court rendered judgment for the defendant and the plaintiff appeals.

J. J. Bell, for appellant.

Argo & Ball, for appellee.

SEEVERS, Ch. J.—This cause is submitted to this court upon the following statement of facts: "It is hereby stipulated and
1. **EVIDENCE: title: admis-** agreed that the above entitled action shall be tried
sions. on the appeal to the Supreme Court of Iowa, on
the following agreed statement of facts:

"A trial of said cause was had to the court at the April term, 1875. The plaintiff proved his title by introducing the original deeds conveying the lands in controversy from the treasurer of Sioux county to Cyrus Ames, and from Cyrus Ames to Fulton & Scribner, and from Fulton & Scribner to the plaintiff.

"The defendant did not introduce his original deeds, or copies of the same, but admitted that the abstract attached to

Ellis v. Peck.

plaintiff's petition was correct so far as it showed title in defendant from the United States, and introduced said abstract in evidence so far as it showed title in him; a copy of which is annexed to plaintiff's petition, marked exhibit "A."

"He then introduced in evidence a tax receipt from the treasurer of Sioux county, dated February 6th, 1869, to show that the taxes of the land in question, for the year 1868, had been paid by defendant before the sale of said land. The plaintiff objected on the ground that the defendant had not shown title in himself. The objection was overruled by the court and the plaintiff duly excepted."

As the abstract of title attached to the petition showed that the defendant was the owner of the land in controversy at the time it was sold for taxes, we see no necessity for the introduction of the patent or deeds. In substance, the plaintiff, by filing the abstract, admitted it to be correct and that defendant was the owner of the legal title at the time of the tax sale. The presumption is that such title remained in the defendant until the contrary is shown. The title being thus for the purposes of this action admitted there was no necessity to introduce evidence to prove what was admitted of record.

AFFIRMED.

ELLIS v. PECK ET AL.

81	113
45	112
83	29
45	112
108	217

1. **Tax Sale: PURCHASE BY DEPUTY TREASURER.** The deputy of the county treasurer is prohibited from acquiring an interest in lands sold at tax sale, and where he entered upon the books a sale as made to a party who was not present, and who subsequently assigned the certificate to him, it was *held* to be invalid.
2. **— : WHEN VOIDABLE.** Such a sale is not void but voidable only, and the fraud of the officer will not defeat the title based thereon, when held by a subsequent purchaser for value without notice, save upon proper proceedings instituted therefor.
3. **— : LEVY: FRAUD.** Where there has been no levy, the sale is absolutely void, and a good faith purchaser for value acquires no title thereunder, because this is a defect which the records of the county disclose, but where the assessment and other jurisdictional steps are regular, fraud may defeat the sale, but will not render it a nullity.

Ellis v. Peck.

Appeal from Benton Circuit Court.

MONDAY, DECEMBER 11.

ACTION in chancery to set aside a tax sale and deed made thereon, on the ground of fraud, to quiet plaintiff's title to the lands described in the deed, and to recover possession of the property. The cause was submitted, upon an agreed statement of facts, to the court and a decree was rendered dismissing plaintiff's petition. He now appeals to this court. The facts of the case appear in the opinion.

Gilchrist & Haines and John McCartney, for appellant.

O. L. Cooper, for appellee.

PECK, J.—I. It must be admitted that the sale of the lands for taxes, under which defendants claim title, was fraudulent. ^{1. TAX SALE: and void under Code, § 885. Rev. § 775. The purchase by deputy treasurer.} The facts which bring it within the provision of this statute are these: The record of the tax sale shows that the land was sold to B. R. Sherman. It appears from the agreed statement of facts that Sherman was not at the tax sale, and did not bid on the land but that the deputy treasurer, who conducted the sale, entered it upon the book as having been made to Sherman, without his knowledge and consent. The certificate of sale was issued in the name of Sherman, and retained in the possession of the deputy treasurer. It was assigned by Sherman to the deputy treasurer, to whom the deed was finally executed. Sherman had no interest whatever in the transaction, and his name was used to enable the officer to acquire the tax title. The statute above cited provides that if any county treasurer shall be directly or indirectly concerned in the purchase of any real estate at tax sale he shall be liable to a penalty prescribed therein, and it is declared, "all such sales shall be void." The act which is illegal and defeats the sale, when made by the treasurer, has the same effect when done by his deputy. The sale in the case before

Ellis v. Peck.

us, under this statute, must be regarded as void in the sense of the word as used in the enactment.

II. The defendants in this case acquired the lands in controversy by purchase from the grantees of the deputy treasurer, to whom the tax deed was made in good ^{2. — : when} ~~voidable~~ faith for value, and without notice of the illegal and fraudulent character of the sale. We are now to inquire whether the title held by them is protected against the fraud and infirmities which would have defeated it in the hands of the purchaser at the tax sale.

In *Van Shaack v. Robbins*, 36 Iowa, 201, this court held that fraud committed by the purchaser at the tax sale would not defeat the title based thereon, when held by a subsequent purchaser for value, who had no notice of the fraud. The section of the Revision construed in that case provides, "that in all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may show and prove fraud by the officer selling the same or in the purchaser to defeat the same, and if fraud is so established such sale and title shall be void." Rev. § 784, Code § 897. It was held that the word *void* must be construed to mean *voidable*, and that the sale and deed are not to be regarded as nullities, but as subject to be defeated in proper proceedings, when the title, in the hands of a party to the fraud, is assailed or attempted to be enforced. The rule of that decision we are satisfied is correct. The case before us is not different in principle. The language of Code, § 885, under which the title in question is assailed, is not different from section 897, construed and applied in *Van Shaack v. Robbins*. The principles and reasons applicable in the construction of each provision are identical.

III. In *Early v. Whittingham*, 43 Iowa, 162, we held that when there was no levy of the lands the sale for taxes was void, ^{3. — : levy} and that a good faith purchaser for value, holding ~~fraud~~ under the party who purchased at the tax sale acquired no title to the land. The distinction between that case and *Van Shaack v. Robbins*, which we follow in this, is obvious, being based upon the following considerations. Without a levy the lands cannot be subjected to sale; it is one of

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the steps necessary to be taken in order to confer the right—the jurisdiction, to sell property for taxes. *McCready v. Sexton & Son*, 29 Iowa, 356 (388). This is the settled, doctrine of this court, the case just cited having been often followed upon this point. Without a levy the sale is a nullity. But in a case where the assessment and other essential jurisdictional steps have been taken, the sale cannot be so regarded. Fraud, as we have seen, will defeat a sale, but will not make it a nullity. When there has been no levy, or other jurisdictional steps have not been taken, the records of the county show the fact. But the frauds, which under the sections of the Code above cited defeat the tax title, do not appear of record. The purchaser of land held under tax deeds may obtain knowledge of infirmities of the title on account of matters appearing of record. He may be unable to acquire knowledge of frauds committed at the sale. The tax payer has three years between the sale and the deed in which to contest the good faith of the purchaser and officers. Then frauds become more difficult to discover and establish by proof, as time intervenes after their perpetration. The tax payer should rather suffer, having the means and opportunity to detect the fraud, than the good faith purchaser of the tax title who has no notice of such frauds, and no means of discovering them. But in cases where the defects in the tax title appear of record the good faith purchaser has no such equity against the land owner.

A question is discussed by counsel involving the effect of the limitation to actions for the recovery of lands sold for taxes, found in Code, § 902. We do not find it necessary to consider the point, as the judgment of the Circuit Court for the reasons above stated must be

AFFIRMED.

Cobleigh v. McBride.

COBLEIGH V. McBRIDE ET AL.

1. **Intoxicating Liquors: SALE TO MINORS: LIEN UPON THE PREMISES.** A judgment for damages for the sale of intoxicating liquors to a minor, under section 1539 of the Code, will not be a lien upon the premises where the liquor is sold, if they are owned by a third party, unless he have knowledge of and assent to the unlawful act for which the judgment is recovered.
2. **— : FORFEITURE TO THE SCHOOL FUND: EVIDENCE.** While it might be proper to inquire into the situation of a witness with respect to the parties, yet it is not competent to inquire of the plaintiff in an action for the benefit of the school fund, under the above section, why he instituted the suit.
3. **— : — : — .** Testimony that it was a matter of common report and public notoriety that intoxicating liquors were sold by the defendant was not admissible.
4. **— : — : INSTRUCTION.** The jury were properly instructed that the recovery would be for the benefit of the school fund, and that the plaintiff had no interest therein.
5. **— : — : CONSTRUCTION OF STATUTE.** Section 1539 applies not only to those having a permit to sell, but also to all persons who may sell intoxicating liquors to minors or to persons who are in the habit of becoming intoxicated.

Appeal from Harrison Circuit Court.

MONDAY, DECEMBER 11.

THE plaintiff, for the use of the school fund, claims of the defendant, S. J. McBride, the sum of two thousand dollars, on account of various alleged sales of intoxicating liquors to a minor, and to persons in the habit of becoming intoxicated, during the year 1875.

No personal judgment is asked against the defendant, McGavern, but it is alleged that during the time of the sales he owned the building in which the sales were made, and he is made a party for the purpose of establishing a lien upon the building for any judgment recovered against McBride. The jury returned a verdict for plaintiff for \$400.

They also found specially that the defendant, S. J. McBride,

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did sell or give away intoxicating liquors in the drug store occupied by him, in Missouri Valley, Harrison county, Iowa, with the knowledge and consent of Geo. H. McGavern.

The court rendered judgment against the defendant, S. J. McBride, for the sum of \$400 and costs, and declared that the judgment be a lien upon the building in which the sale was made. The defendants appeal.

Mickel & Brown and *W. S. Shoemaker*, for appellants.

No argument for appellee.

DAY, J.—I. As the appeal of the defendant, McGavern, presents for our consideration distinct questions, which have no connection with the question of the liability of the defendant, McBride, we will, in the first place, consider such questions as affect McGavern alone; and, in the second place, such as affect McBride alone, or both defendants together.

1. The defendant, McGavern, owns the building in which the alleged unlawful sale was made. Section 1558 of the Code provides that all judgments of any kind rendered against any person, for any violation of the provisions of the chapter relating to intoxicating liquors, shall be a lien upon the premises and property occupied and used for the unlawful purpose, by the person manufacturing or selling in violation of law, with the consent and knowledge of the owner thereof. The petition in this case charges the defendant, McBride, with violating the provisions of section 1539 of the Code, in that he sold intoxicating liquors to a minor, and to persons in the habit of becoming intoxicated.

The jury found specially that S. J. McBride did sell or give away intoxicating liquor in the drug store occupied by him in Missouri Valley, Harrison county, Iowa, with the knowledge and consent of George H. McGavern. The defendants moved in arrest of judgment upon the ground that the special finding of the jury does not show that defendant, McGavern, had any knowledge of and gave consent to the sales of intoxicating liquors testified to by the witnesses on the stand, within

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the year 1875, and for which plaintiff claims forfeiture to the school fund. The action of the court in overruling this motion, as to the defendant, McGavern, is assigned as error. In our opinion, the motion in arrest of judgment should have been sustained. Simply selling or giving away intoxicating liquors, if done without permit, or for an unlawful purpose, is one offense. The selling or giving intoxicating liquors to a minor, or person intoxicated, is altogether a distinct and more aggravated offense, for which a more severe punishment is prescribed. In order that a judgment for a violation of any of the provisions of the chapter relating to intoxicating liquors may be a lien upon the premises in which the unlawful act is done, owned by a third party, such person should have knowledge of and assent to the unlawful act on account of which the judgment is recovered.

The special finding in this case does not show that McGavern had such knowledge, or that he gave such assent. It did not authorize the declaring of the judgment a lien upon his premises.

2. The court instructed the jury as follows: "18th. If you find that the defendant, Geo. H. McGavern, bought intoxicating liquor during the year 1875 of the defendant, S. J. McBride, or if he sent other persons there for that purpose, this would be such knowledge and consent on his part as would bind the building owned by him, and authorize you to find against him." This instruction is erroneous for the reasons already considered. Even if McGavern had knowledge that McBride was selling intoxicating liquors, his property would not be liable for a judgment recovered, unless he knew McBride was selling to minors or persons in the habit of becoming intoxicated.

Several errors have been assigned by McGavern relative to the admission of testimony, which need not be considered, as the cause must, as to him, be reversed for the errors above discussed, and the same questions will not likely arise upon the re-trial.

II. We now consider the assignments of error which affect

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the defendant, McBride, either separately or in conjunction with his co-defendant.

1. Upon cross-examination of plaintiff the defendant asked why he instituted the suit. The plaintiff's objection was sustained, and defendant assigns the action as ~~feiture to the school fund~~: error. Whilst it may be proper, upon cross-evidence, examination, to inquire into the situation of a witness with respect to the parties, and his feelings toward a party against whom he testifies, yet we think this question, in the broad terms in which it was proposed, was improper.

2. The plaintiff was permitted, against the objection of defendant, to testify that it was a matter of common report ~~and public notoriety~~: and public notoriety that intoxicating liquors were sold at McBride's drug store. This, we think, was error. But, in the state of the record, it was error without prejudice, except as to a portion of the verdict. The statute provides that for each offense the party offending shall forfeit and pay to the school fund the sum of one hundred dollars. The jury returned a verdict for four hundred dollars, and hence must have found there were four distinct violations of the statute. As to three of these the proof is positive and without conflict. A verdict the other way would have been unsupported by the testimony. The witness who testifies to the fourth sale has been in some degree impeached, thus raising some question respecting that sale. It may be that the verdict of the jury as to this sale was aided by this objectionable testimony.

3. The defendants assign as error the giving of the following instruction: "The plaintiff, E. J. Cobleigh, prosecuted ~~this action for the use and benefit of the school instruction~~: this action for the use and benefit of the school fund, and has no more interest in the result of this prosecution than any other citizen of this county, as he cannot receive anything personally from any judgment that may be rendered." This instruction is not erroneous. Appellants claim that it is an assumption of a fact peculiarly within the province of the jury. But that the amount of the recovery goes to the school fund and not to plaintiff is a question of law.

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4. Appellants contend that section 1539 of the Code applies only to persons having a permit to sell, and that McBride is ~~s.~~ not amenable thereto, because he had no permit. We are satisfied that the section applies alike to all persons. Except as to the admission of the testimony above considered, we discover no error in the record in any way prejudicial to the defendant McBride. If the plaintiff shall, within twenty days from the filing of this opinion, file in this court his election to remit one hundred dollars of the judgment, as to the defendant McBride the judgment will be modified and affirmed, otherwise it will be reversed.

As to the defendant McGavern the judgment is

REVERSED.

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THE FIRST NATIONAL BANK OF DAVENPORT v. THE DAVENPORT & ST. PAUL R. CO.

1. **Garnishment: WHEN PROPERTY IS LIABLE: PRINCIPAL AND AGENT.**

It is not necessary that one should have the independent possession of the property of another, coupled with the right to maintain the custody and control of it, to render it subject to garnishment in his hands. Although he may act under the orders of another who has the disposition of the property, yet he may still be liable as a garnishee in an action against their common employer.

2. **RULE APPLIED.** C. was the cashier and auditor of a railway company, and was garnished as a debtor holding funds of the latter. After service of the process he surrendered the key of the safe to another employe who in his absence removed the funds of the company therefrom; in his capacity as an employe of the company, he acted under the orders of a general manager who had the entire control and disposition of the moneys of the company in the hands of the cashier: *Held*, that the latter was liable as garnishee.

Appeal from Scott District Court.

MONDAY, DECEMBER 11.

THE First National Bank of Davenport, Iowa, recovered judgment against the Davenport & St. Paul Railroad Com-

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pany, and the Davenport Railway Construction Company, for the sum of \$15,934.77 and costs. On the 3d day of December, 1874, executions were issued on this judgment, and, on the same day, J. S. Conner, among others, was garnished personally, and as treasurer of the Davenport & St. Paul Railroad Company. Feb. 15, 1875, J. S. Conner answered as follows: "In December, 1874, I was engaged in the same business I am to-day secretary and treasurer of the Davenport and St. Paul Railroad, and auditor and cashier of the operating department of the Davenport Railway Construction Company; have been so engaged since 1872. In December last (1874) I had no money in my possession or control belonging to the Davenport & St. Paul Railroad Company, or in which they had any interest. As treasurer of the said railroad company, I had no control over its money except to pay as ordered when I had any in hand. I had no money of this company on hand in December last. I cannot tell without looking at my books whether or not there was any money deposited in the First National Bank to my credit as treasurer.

"The money deposited in the First National Bank lately to my credit as treasurer did not belong to the Davenport and St. Paul Railroad Company, but to the operating department of the Davenport Railway Construction Company. I have been receiving the money of the operating department of the Davenport Railway Construction Company since 1872. From 1872 up to now I have received money belonging to the Davenport and St. Paul Railroad Company, as its treasurer; I cannot tell when and how much without looking at my books. The books are in my possession and control, and I will produce them, the counsel on the other side furnishing the transportation. There was no money in the First National Bank in December last, to my credit as treasurer; the last money received by me as treasurer of the Davenport and St. Paul Railroad was in March, 1874, amount \$40. This \$40 was received on account of the rent of a house in East Davenport.

"The rents, income, profits, freights, tolls, etc., of the Davenport & St. Paul Railroad, for the years 1873 and 1874, were

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under the control of C. W. Smith, general manager of the operating department of the Davenport Railway Construction Company, and were expended in paying the employes, and for supplies furnished for operating the road. The receipts were expended only as ordered by C. W. Smith, general manager of the Davenport Railway Construction Company. After my garnishment on December 3d, 1874, a part of the earnings of the Davenport and St. Paul Railroad were sent to C. W. Smith as general manager, and part were paid to employes by his authority; they were sent to C. W. Smith by the station agents; I do not know how much was paid to the employes after my garnishment. I think Mr. Kellogg was employed by C. W. Smith as assistant cashier, and acted in my place after my garnishment, Dec. 1, 1874. After garnishment my pay as auditor was the same that it was before the garnishment for both auditor and cashier. I have not been paid for that month, December, 1874.

"The president and directors of the Davenport and St. Paul Railroad had nothing to do with its management and operation for the years 1873 and 1874; they had nothing to do with disbursing the money received for operating the road. I do not know of any money in the hands of any one belonging to the Davenport & St. Paul Railroad, or the Davenport Railway Construction Company, or in which either company has any interest. I do not know of any property belonging to either company. The income of the road for the years 1873 and 1874 has paid all the expenses of the road, and for the two years about \$4,000 over. As general manager of the Davenport Railway Construction Company, Mr. C. W. Smith has accounted for all the money he has received except for the month of December, 1874. I cannot say how much money Mr. C. W. Smith has unaccounted for; I don't think it is as much as \$5,000."

Upon cross-examination and re-examination the garnishee stated: "At the date of the garnishment I had a knowledge of a mortgage on the rents, taxes and profits of the railroad—I knew at the time of the garnishment and before. At the date of the garnishment, December 3, 1874, I had no funds in my

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hands belonging to the judgment debtors except what belonged to the operating department of the Davenport Railway Construction Company; I do not know whether these funds were disbursed for operating expenses or not. I had on hand December 3d, at the time of the garnishment, belonging to the operating department of the Davenport Railway Construction Company, three thousand four hundred and forty-three dollars. I don't know that it has been paid out—I never paid it out; it was taken out of the safe in my absence, by order of C. W. Smith, general manager, with the exception of \$151.50, which I paid to Mr. French, subsequent to his appointment as receiver. Mr. Smith ordered the funds to be taken from the safe, at least he told me so himself. They were gone, except the draft for \$151.50. I have had nothing since the garnishment; I handed over the draft for \$151.50 to the receiver, because I thought he had the right to take charge of and receive all the property and funds on hand. In the report to the United States Court it was mentioned among the funds as received from J. S. Conner, garnishee. During the months of October, November, December and January, the earnings were enough to pay expenses, but the receipts were not. The earnings were not received because the amount due for through freight from the Chicago and Northwestern Railway Company was garnished and not yet received. The \$40 received for rent was disbursed prior to the garnishment. The funds (\$3,443) were taken from the safe during my absence from the city, without my knowledge or consent. The mortgage was given by the Davenport & St. Paul Railroad Company. During my absence Mr. N. H. Wood, the superintendent of the road, had access to the safe; no one else, without his consent, had access to the safe—I delivered the key to him; he knew that I was garnished when I delivered the key to him. I did not know and did not suspect that the funds would be taken out of the safe in my absence.

"Mr. C. W. Smith, nor any one else interested in the funds (the \$3,443), has agreed to save me harmless by reason of the said funds having been taken out of the safe. I made no effort to have funds returned, except to remonstrate with Mr. C. W.

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Smith; he told me that I was not, and could not be held personally liable. I did not know of any steps I could take to get possession of the said funds, but would have taken steps to regain possession of the said funds. The understanding between Mr. French and me is that the \$151.50 is to be paid over as the District Court of Scott County shall direct."

The plaintiff having moved for judgment against the garnishee on this answer, on motion of J. S. Conner it was ordered that his answer be re-taken, and on the 7th day of October, 1875, an additional answer of the garnishee was filed, as follows: "The Davenport & St. Paul Railroad Company was organized to build a road from Davenport, Iowa, to St. Paul, or some point near the north line of the State; a part of the road being completed and in operation, arrangements were made with the Davenport Railway Construction Company, a distinct corporation, by which the latter, some time in 1872, took possession of the Davenport & St. Paul Railroad, and kept possession till the appointment of a receiver in 1874, operating the said railroad all the time. The business of the Davenport Railway Construction Company was conducted in the several different departments. The business of operating the Davenport and St. Paul Railroad was kept separate and apart from its other business, and was conducted by C. W. Smith, of Indianapolis, Indiana, the general manager. I was not an officer of the construction company; for several years I have been an employe; have discharged the duties of auditor and cashier; as auditor I had charge of the accounts of the operating department, examined agents' reports, and kept the books; in this department was also prepared vouchers for labor and supplies. As cashier, it was my duty, with the assistance furnished me, to examine and receipt for the cash remitted by the agents, to make collections from the roads, and generally to cause anything to be done necessary to the prompt and regular collection of the earnings of the road, and to make such disposition of the cash in hand as I was directed from time to time by Mr. C. W. Smith, general manager. Sometimes I deposited in bank to such amount as I was directed; sometimes keeping it in the safe in the office, some-

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times getting bills of exchange and remitting as directed. I claim I never was indebted to the Davenport Railway Construction Company; I was not indebted to them on December 3, 1874, when I was garnished; I claim I did not then have in my custody and control any money or property belonging to them. The \$3,443 mentioned in my former answer was so much cash in hand in the office, and was in the company's safe, where I had placed it; it was not then, and never was under my control, but was always under the control of my superiors. On being garnished I was forbidden to touch any of the company's money or any money coming in, and was ordered to go to Indianapolis by first train, which I was obliged to do; another was placed in charge of the cash, and I was not allowed to have anything to do with it until after the appointment of the receiver. I was ordered to deliver the key to Mr. Wood, the superintendent, and was obliged to do so; I could not disobey the orders given me; I had not the right nor the power to do so. The office of the Davenport Railway Construction Company, where the business was principally transacted, was in New York City; its officers were B. E. Smith, president; Geo. H. French, secretary; Andrew Carnegie, treasurer; its construction department was in charge of James M. Brown, engineer, with headquarters at Davenport, Iowa; its operating department was in charge of C. W. Smith, with headquarters at Indianapolis, Indiana. Mr. Smith was also in charge of other railroad lines, as general manager, in which the construction company, or some of its members, were interested. The auditor and cashier in the office of a railroad company is simply an employe, and is in no sense an officer of the company."

Upon cross-examination and re-examination, the garnishee further stated: "At the time I was garnished the \$3,443 was in my possession, subject to the orders of the general manager; it was in the safe of the company, in the office, locked up; I put it there, as directed by C. W. Smith; I had no right, power or authority to remove it, except as ordered by my superiors. When I said it was in my possession, I simply meant that I had charge of it, to be disposed of as directed by

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my superiors. I did not have independent control of that money or any other money belonging to the company that passed through my hands. I had no authority to remove the money from the company's office or safe, except as ordered by my superior. At the time I put the money in the safe, I had the key to the safe, and no one else had a key. At the time I was garnished the money was in the safe, and I had the key. The money that came into my possession, as cashier, was sometimes deposited in the bank; I did so under orders from C. W. Smith. In November, previous to the garnishment, I was expressly ordered not to deposit any money in the bank. I do not know of my own knowledge why this order was given; my opinion is that the money was ordered to be kept in the safe to prevent its being reached by garnishment. What I said as to the money being deposited in the safe to prevent its being garnished, is matter of opinion. At the time I turned the key of the safe over to Mr. Wood, in obedience to the orders of C. W. Smith, the \$3,443 was in the safe; I turned the key over immediately after notice of removal. I was garnished on the evening of the 3d of December, 1874, about twenty minutes after six, and was removed the next morning about, or shortly after, nine o'clock."

The garnishee thereupon filed a motion for an order discharging him as garnishee, and the plaintiff filed a motion for judgment against the garnishee for \$3,443.

The motion of plaintiff was overruled, and the motion of the garnishee to be discharged was sustained, to all of which the plaintiff excepted. Plaintiff appeals.

Grant & Smith and C. Whitaker, for appellant.

Brown & Campbell, for appellee.

DAY, J.—We have set out in full the answer of the garnishee, because thereon, alone, depends the question of the garnishee's liability.

The garnishee asserts that at the time of his garnishment

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he did not have in his custody and control any money or property belonging to the Davenport Railroad Construction Company. Still he concedes that he did have some kind of possession of \$3,443, belonging to that company. He sets forth the facts connected with the relation in which he stood to that money, and whether or not it was so in his custody and control as to make him liable to the process of garnishment is a legal inference to be drawn from the facts proved.

1. **GARNISHMENT:** When property is liable, principal and agent. The answer of the garnishee shows that he was auditor and cashier of the operating department of the Davenport Railway Construction Company. As auditor he had charge of the accounts, examined agents' reports, and kept the books. As cashier it was his duty to examine and receipt for the cash remitted by the agents, to make collections from the roads, and to cause anything to be done necessary to the prompt and regular collection of the earnings of the road, and to make such disposition of the cash in hand as he was directed to make from time to time by the general manager, Smith. At the time of his garnishment he had on hand, of money so received, belonging to the operating department of the Davenport Railway Construction Company, \$3,443. This money was kept in a safe provided by the construction company, to which the garnishee alone had a key. The garnishee claims that he is not liable because he did not have independent control of the money, but was under obligation to dispose of it as directed by his superiors. The position of appellee cannot be better expressed than in the following quotation from the argument of his counsel: "The fallacy of the plaintiff's argument consists in assuming that the garnishee had these moneys in his *possession* and in *his custody* or *under his control*, a fact which has not only not been proved, but the contrary most clearly and distinctly appears. The possession and control of property contemplated by the statute, does not mean the mere *physical* power to take possession of it and carry it off; but the independent possession—the present and immediate *rightful* custody of it, including the right to retain that possession, and to maintain that custody and control of it.

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The law does not require that the garnishee should commit a trespass, or a gross breach of faith, in order to obtain or retain possession of the attached property."

Appellee, in assuming that the possession which will warrant the process of garnishment must be an independent possession, coupled with the right to retain possession and maintain custody and control, is, we think, clearly in error. Aside from express contract, one does not obtain such possession and control of the property of another. Suppose a party makes a simple deposit of money in a bank, without any agreement as to the time the deposit shall remain. The bank holds the money entirely subject to the control of the owner. It cannot rightfully hold the money an hour after the owner has directed it to be paid out. Yet it cannot be questioned that, while the money remains in the bank, the bank may be garnished. Suppose garnishment process served upon the bank, and that afterward the owner orders the money to be paid out in a particular way. Does the bank commit a breach of faith in holding the money, and refusing to dispose of it as directed by the owner?

The fallacy of the appellee's argument is in placing the duty of the garnishee to his principal above his duty to obey the mandate of the law. It may be conceded that the answer of the garnishee fully discloses that it was his duty to pay out the money in his possession as ordered by Smith; but the process of the court imposed upon him a paramount duty to retain it in his possession, and an obedience to that order would not render him a trespasser, nor involve him in a breach of faith. We think appellee's counsel concede enough to establish the liability of this garnishee. In their argument they say: "We do not take the ground * * * * that Conner cannot be held because he was an employe, and not an officer of the corporation. An employe may clearly have such possession—such custody and control of the property of his employer as to subject it to garnishment in his hands. It depends altogether upon the nature of the employment. For instance, the agent of a railroad at one of its stations certainly has the unqualified and independent posses-

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sion and control of the moneys of the company which come into his hands. He is only an employe, yet the nature of his employment and of his duties may, and probably would, render the moneys in his hands subject to garnishment. He has the independent possession, control and custody of those moneys; while the cashier whom the company might employ to assist him in his work, by looking after and keeping accounts of those moneys, would not have any such possession and control of them."

Yet, these station agents are subordinate to the garnishee in this case, and are required to remit to him the moneys by them collected. Suppose such an agent had been garnished, and he had immediately been removed, and ordered to pay over all the moneys in his hands to Conner. Could he afterward retain the money without a gross breach of faith? If he could, we are unable to see why the garnishee in this case may not do the same; and, if he could not, it is apparent that a railway company may, at pleasure, render the process of garnishment unavailing. We are satisfied that the appellee had such custody and control of the money in question as to render it subject to garnishment in his hands. He should have retained that possession, and held the money subject to the order of the court. In failing to do so he has magnified his duty to his employer, and has ignored his obligations to the law. The court should have held him liable upon his answer.

REVERSED.

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SAVAGE V. SCOTT ET AL.

1. **Statute of Limitations:** RESIDENCE: CITIZENSHIP. Residence and not citizenship is contemplated in the statute prescribing limitations upon the time of bringing actions, and the statute runs in favor of a debtor who has his domicile in the State.
2. ——: ——: DEMISE. The statute ceases to run when the debtor becomes a non-resident, but revives upon his demise.
3. **Mortgage:** CANNOT BE EXTENDED. The security of a mortgage cannot be extended to embrace debts of the mortgagor to the mortgagee not provided for in the instrument itself.

Appeal from Washington District Court.

MONDAY, DECEMBER 11.

ACTION to foreclose a mortgage. The plaintiff claims to recover, in addition to the amount due on the promissory note which is secured by the mortgage, the sum of \$56.20 paid by him for taxes levied upon the real estate covered by the incumbrance. The petition shows that the mortgagor was, at the time of the execution of the mortgage, a non-resident of the State, and continued to be to the time of his death. The defendants are his heirs, and a grantee of his widow's interest, and are shown by the petition to be non-residents. The answer of defendants, among other matters, alleges that the mortgagor, at the date of the execution of the incumbrance, was a resident of the State, and so continued for a time after the note secured by the mortgage became due, and then removed to Pennsylvania, and afterwards died in that State, and more than ten years has elapsed after his death was known to plaintiff; that he left no other property besides the real estate covered by the mortgage, and that administration has not been taken out upon his estate. The cause was submitted to the court and the following finding of facts was made:

“First. That one William Scott, on the 20th day of June, A. D. 1857, purchased of the plaintiff lots number eight and nine (8 and 9), in out-lot number fourteen (14), in the town

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of Washington, Iowa, and on that day executed his promissory note for the purchase money to the plaintiff for the sum of three hundred and fifty dollars, and which said note is in words and figures following, that is to say:

“ ‘June 20, 1857.

“ ‘Ten months after date I promise to pay to Alexander Savage the sum of three hundred and fifty dollars, with ten per cent from date, for value received. Witness my hand.

“ ‘Wm. Scott.’

“ *Second.* That afterwards and on the 16th day of January, A. D. 1858, said Scott, to secure the payment of said note, executed and delivered to plaintiff a mortgage upon said lots, to be void on payment of the note made by William Scott to Alexander Savage, dated June 20th, 1857, for \$350; mortgage dated January 16th, 1858, and acknowledged and recorded January 18th, 1858.

“ *Third.* That afterwards the plaintiff removed from the State of Iowa to California, and one Henry Savage, a brother of plaintiff, either paid or caused to be paid in his name, or redeemed or caused to be redeemed from tax sale in his name, the taxes assessed against the said lots, and also caused the lots to be assessed in his name; that he thus paid out the sum of fifty-six dollars and twenty-three cents in all; that such payments were made without the knowledge of the plaintiff, and the money so expended was the money of the said Henry Savage. But a short time before this suit was commenced the plaintiff paid his brother a visit and was then informed of what his brother had done, and was satisfied with or approved the same, and then employed his brother to look after his interest in and claim upon the lots.

“ *Fourth.* That William Scott, being a married man, left his home in Washington county, Pennsylvania, and came to Washington county, Iowa, in April, A. D. 1857, and entered into business and remained in said county and engaged in said business until some time in September or October, 1858, at which time he returned to Pennsylvania with the intention of returning with his family to Iowa.

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"That during the time he was in Iowa he voted at one of the elections, and was during that time engaged with others in partnership in running a saw mill, and during that time frequently spoke of his intention of making Iowa his permanent home, and for that purpose had a bill of lumber sawed to build a house for a home upon the lots that were mortgaged to plaintiff.

"That shortly after his return to the State of Pennsylvania he offered to vote there and his vote was challenged, but whether he was permitted to vote does not appear; that said Scott never returned to Iowa, being taken sick shortly after reaching his old home in Pennsylvania, and never recovering fully from such sickness, but died February 11th, 1862, intestate, leaving a widow and two children, the defendants herein, as his only heirs at law surviving him.

"Fifth. That the defendant, R. M. Stinson, is, by purchase from the widow of said William Scott, the owner of her interest in the said lots.

"Sixth. That from the time the said note became due, and up to September or October, A. D. 1858, thereafter, the said William Scott was living in Washington county, Iowa, the place where the note was executed, and within the jurisdiction of the courts of this State, and suit might have been instituted upon said note and mortgage against him, and personal service had upon him.

"Seventh. That the widow and children of said William Scott have never lived in Iowa or been in this State."

Upon these facts the District Court decided that plaintiff was not entitled to recover for the taxes paid, and that his action upon the note and mortgage was barred by the statute of limitations, and entered a decree accordingly. Plaintiff appeals.

Stubbs & Leggett and G. W. Howe, for appellant.

Ed. W. Stone, for appellees.

BECK, J.—I. Under the statute of limitations in this State, actions of this kind are barred in ten years. Code, § 2529,

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par. 4. But it is provided that "the time during which a defendant is a non-resident of the State shall not be included in computing any of the periods of limitation" prescribed in the statute. Code, § 2533. Under this statute the period of limitation, having commenced to run in favor of a resident debtor, is arrested by his becoming a non-resident.

It becomes important to determine whether the statute began to run against the claim which is the foundation of this action. From the court's finding of facts, it appears that for more than four months after the note became due the mortgagor was in this State, voted at an election, was engaged in business, and had the intention of making his permanent home here. He was surely a resident of this State so far as to be subject to its jurisdiction and to be capable of exercising all the rights of citizenship. It cannot be doubted that, during the time of his residence, he was subject to process of the courts, and an action could have been brought against him. We need not inquire in what state he holds a domicile; he had a residence here of the character that would subject him to process of the courts of this State. *Love v. Cherry*, 24 Iowa, 204. While he held this residence the statute of limitations ran against the note and mortgage. That the statute runs in favor of all residents of the State cannot be questioned, for the plain reason that the section, 2533, above cited declares it shall not run in favor of a non-resident. That residence in the State, and not citizenship or domicile, determines the fact of the meaning of the statute cannot be doubted. The distinction which the law draws between the place of residence and that of domicile or citizenship is plain. A man may have more than one place of residence, but he can have but one domicile, and can hold citizenship in but one State. *Love v. Cherry*, 24 Iowa, 204. Personal actions in this State must be brought in the county where the defendant *actually resides*. Code, § 2586. Of course one having an actual residence in this State may be sued in our courts. We conclude that the note and mortgage, under the facts found by the court, could have been sued upon in this State at any time for near five

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months after maturity, in a personal action against the mortgagor, and that the statute of limitations ran for that time.

II. The statute ceases to run upon the debtor becoming a non-resident; when that disability is removed it resumes its ^{2. —: —:} operation. To be a non-resident of this State, one ^{demise.} must be a resident elsewhere. The word non-resident implies that one so described holds a residence in another place. But we cannot say of a deceased person that he is a non-resident, for he holds a residence nowhere. The disability of non-residence is removed in case of death.

This view is supported upon the consideration that on the death of a debtor claims which, in his life, were enforced by personal actions against him become the subject of proceedings prescribed by law against his administrator or executor. The personal representative takes the place of the deceased. The creditor has it in his power, if property of the estate be found here, to cause an administrator to be appointed, without delay, against whom proceedings may be at once instituted. His legal remedy, which was suspended by the debtor becoming a non-resident, is revived at the debtor's death. From the moment the remedy is revived, the statute of limitations begins again to run. These views, and the conclusion we reach, are sustained by the following authorities: *Christophers v. Garr*, 6 N. Y. (2 Seld.), 61; *Teal v. Ayres*, 9 Texas, 588.

III. The plaintiff seeks in this action to foreclose the mortgage for the amount paid by him for taxes, with interest, <sup>3. MORTGAGE: as well as the amount of the promissory note
cannot be ex-
tended.</sup> secured by the incumbrance. This relief cannot be granted. The mortgage contains no condition for securing the sum advanced for taxes or any other debt, except that evidenced by the promissory notes. The security cannot be extended to cover debts not provided for in the mortgage, in the absence of facts and equities which would require a court of chancery to give it such effect. Such equities do not exist in this case.

No other points arise in the case for our determination. The judgment of the District Court is

AFFIRMED.

CARMAN v. ROENNAN.

1. **New Trial: NEWLY DISCOVERED EVIDENCE.** A new trial will not be granted on the ground of newly discovered evidence, where the matter to which the evidence relates was distinctly put in issue in the pleadings, and the application fails to disclose the exercise of reasonable diligence to obtain the evidence.
2. **Evidence: ORDER OF: PRACTICE.** The order of the introduction of evidence rests largely in the discretion of the trial court, and its action in permitting the plaintiff to offer testimony not rebutting after the defendant has closed his testimony will not be disturbed where no abuse of discretion is shown.

Appeal from Mills District Court.

MONDAY, DECEMBER 11.

THE plaintiff alleges: 1. That the cattle of defendants broke into plaintiff's premises, inclosed with a lawful fence, and damaged his crops to the extent of one hundred dollars. 2. That the defendant's cattle, being unlawfully on plaintiff's premises, broke into the adjoining field of one D. W. Rowe, inclosed with a lawful fence, and damaged his crops to the extent of one hundred and fifty dollars; and that Rowe duly assigned his claim to plaintiff. The answer is a general denial.

There was a jury trial, and a verdict for one hundred and fifty dollars. The motion for new trial was overruled, and judgment was rendered upon the verdict. Defendant appeals.

Hale, Stone & Proudfoot, for the appellant.

Watkins & Williams, for appellee.

DAY, J.—I. It is urged that the verdict is not supported by the evidence. It is clearly proved that defendant's cattle damaged the crops in question. The evidence is very conflicting as to the character of the fence inclosing the premises. It is probable that, if we were to determine the question as an original one, we would, from the evidence in the abstract, find that plaintiff's fence was not a lawful one. But the verdict

Carman v. Roennan.

is not unsupported by the evidence to an extent that would justify our disturbing it. Besides, a supplemental agreed abstract is submitted, in which it is admitted the abstract does not contain all the evidence.

II. It is claimed that the motion for a new trial should have been sustained on the ground of newly discovered evidence. The newly discovered evidence relates to the condition of the partition fence between Carman and Rowe. The condition of this fence was distinctly put in issue by the pleadings. Appellants do not show any diligence to discover testimony respecting it. Of the witnesses who, it is claimed, will testify to newly discovered facts, two were witnesses upon the former trial, and another was a juror, and it is not claimed that the only remaining one will testify to any fact other than can be proved by the other three. Appellants should have shown the employment of diligence to secure testimony on this point. *First National Bank of Iowa City v. Charter Oak Insurance Company*, 40 Iowa, 572; *Lisher v. Pratt*, 9 Iowa, 59; *Richards v. Nuckolls*, 19 Iowa, 555; *Kilburn v. Mullen*, 22 Iowa, 498.

III. In rebuttal plaintiff was permitted to prove the condition of the fence between him and Rowe. Defendants insist that this testimony was not rebutting evidence, and that it should not have been admitted. As the abstract does not contain all the evidence, we have no means of determining whether or not the evidence was rebutting, and we will presume that the action of the court below respecting it was correct. Besides, this is a matter which rests very largely in the discretion of the trial court. *Hubbell & Bro. v. Ream*, 31 Iowa, 289; *Crane v. Ellis*, Id., 510; *Cannon v. Iowa City*, 34 Id., 203. No error appears in the record.

AFFIRMED.

Babcock v. Meek.

BABCOCK V. MEEK.

1. Evidence: PLEADING: STATUTE OF FRAUDS. A parol contract which is within the statute of frauds may be established if not denied in the pleadings or if admitted by the party against whom it is sought to be enforced, but in such case the petition should state the manner in which it is expected that the contract will be proved, otherwise it will be subject to demurrer.

45	137
82	586
45	137
94	609

Appeal from Washington District Court.

MONDAY, DECEMBER 11.

THE petition, in substance, alleges that on the 16th day of February, 1876, plaintiff contracted with defendant, by parol, to purchase of him seventeen head of fat cattle, then on the defendant's farm in Washington county, for the sum of five hundred dollars; that defendant was to drive the cattle to the town of Washington and deliver them to the plaintiff; that he failed to drive the cattle to the place agreed upon, and by writing notified plaintiff that he would not deliver them. Plaintiff claims damages in the sum of two hundred and fifty dollars.

The defendant demurred upon the ground that the petition seeks to recover on a parol contract for sale of personal property, when no part of the property was delivered, and no part of the purchase money was paid.

The court sustained the demurrer, and, plaintiff failing to amend, rendered judgment against him for the costs. Plaintiff appeals.

A. H. Patterson & Son, for appellant.

McJunkin, Henderson & Jones, for appellee.

DAY, J.—Section 3663 of the Code provides that: “Except when otherwise specially provided, no evidence of the con-

1. EVIDENCE: PLEADING: STATUTE OF FRAUDS. tracts enumerated in the next succeeding section is competent, unless it be in writing, and signed by the party charged or by his lawfully authorized

Babcock v. Meek.

agent." It is conceded that the contract in question falls within the first subdivision of section 3664.

Sections 3666 and 3667 of the Code are as follows: "The above regulations, relating merely to the proof of contracts, do not prevent the enforcement of those which are not denied in the pleadings, unless in cases where the contract is sought to be enforced, or damages to be recovered for a breach thereof, against some person other than him who made it. Nothing in the above provisions shall prevent the party himself against whom the unwritten contract is sought to be enforced from being called as a witness by the opposite party, nor his oral testimony from being evidence."

Appellant insists that, under these provisions, the only course left for a party, against whom any of the enumerated unwritten contracts is sought to be enforced, is to deny the making of it, leaving the other party to prove it by the testimony of his adversary, if he can do so. But this position ignores section 2648 of the Code, which provides that the defendant may demur to the petition when it appears on its face that the claim is barred by the statute of limitations, or fails to show it to be in writing, when it should be so evidenced.

The only way in which effect can be given to all these provisions of the statute is to require a party seeking to recover upon a parol contract, relating to any of the subjects embraced in section 3664 of the Code, to state in his petition that he relies for proof of his claim upon the testimony of the defendant, or some equivalent averment.

For a full discussion of this subject arising under an analogous provision respecting the statute of limitations, see *Newfield v. Blawn*, 16 Iowa, 297.

The judgment of the court below is

AFFIRMED.

The State v. The K. C., St. J. & C. B. R. Co.

THE STATE v. THE K. C., ST. J. & C. B. R. CO.

45	139
97	460
45	139
109	488
45	139
117	307
45	139
132	713

1. **Highway: PRESCRIPTION.** In the strict sense of the term, a highway cannot be established by prescription, since there can be no such thing as a grant to the public, but common usage has applied the term to highways whose existence is based upon long and continuous use.
2. _____ : _____: **ANIMUS DEDICANDI.** A highway which is opened and used with the assent or acquiescence of the owner will be presumed to have been intentionally dedicated by him to the use of the public, but his assent will be presumed only when he is aware of the use of his property by the public, or when the facts will justify the presumption that he is aware of its use.
3. _____ : _____: **UNINCLOSED LANDS.** The use of wild and uninclosed timber or prairie land by the public as a highway will not raise a legal presumption that the owner had notice of the use of the land for such purpose.

Appeal from Fremont District Court.

TUESDAY, DECEMBER 12.

THE defendant was indicted and convicted for obstructing a highway, and from the judgment appeals to this court.

Sapp & Lyman, for appellant.

M. E. Cutts, Attorney General, for the State.

BECK, J.—To establish the existence of the highway alleged in the indictment to have been obstructed, the State introduced and relied upon evidence tending to show that, for more than ten years, the road had been traveled by the public. No evidence was introduced of action, by the proper authority under the statute, to establish the road, nor was any positive act of dedication by the land owners shown. The existence of the road was claimed solely on the ground that it had been used by the public for such a time and in such a manner that it acquired therefrom, under the law, the character of a public highway. As applicable to this aspect of the case the District Court gave the following instructions to the jury:

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"The existence of a public highway may be proved in either of the following ways:

"1. By proof of its establishment in the manner prescribed by law, or,

"2. By a dedication by the owner of the fee, and an acceptance by the public, or,

"3. By proof that the public has used and occupied the ground as a highway, under a claim of right to use it, for such period of time, and in such manner, as that the law will presume therefrom, either that there was an original dedication by the owner, and an acceptance by the public, or that the necessary steps for the establishment of the highway were originally taken by the public officers whose duty it was to take such action."

"The State relies in the present case on proof of the latter character to establish the alleged highway described in the indictment. To show the existence of the highway in this manner, then, the State must prove the following facts:

"1. That the public has used and occupied the ground on which the alleged obstruction took place as a highway for a period of ten years or more before the time of the alleged obstruction.

"2. That such use and occupation by the public was under claim of right to use and occupy it as a highway, and

"3. That such use and occupation by the public was with the knowledge of the owner of the soil.

"But if the occupation and use by the public was open and notorious, the knowledge and consent of the owners may be inferred from the circumstances and need not be established by direct proof. If the State has established these facts, and has shown that the defendant, in the manner and form charged in the indictment, did obstruct the highway, it will be your duty to convict the defendant."

To these instructions defendant, at the time, excepted, on the grounds that they do not direct the jury that, if they find the lands to be open, unoccupied and uncultivated, the State must establish actual knowledge by the owners of the use thereof for a highway and that such knowledge will not be inferred

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from use alone, and they fail to state that such occupation of the lands for a highway was under a claim of right and was continuous and uninterrupted.

Counsel for defendant asked the court to give the jury the following instruction, which presents their views of the law upon this point:

"Before there can be a highway established by prescription, there must have been a continuous and uninterrupted use thereof by the public, with the knowledge of the owner of the land. If, in case you find from the evidence that the land * * * * * over which it is claimed a highway had been established by prescription, was open, unoccupied and uncultivated prairie, then it must appear from the evidence that the use of the same as a highway was with the knowledge of the owner of the land. Such knowledge will not be presumed. And, unless such knowledge has been established by the evidence, then you cannot find that there was a highway by prescription across said land." This instruction was refused.

Counsel for appellant now insist that the District Court erred in its rulings upon these instructions in holding: *first*, that the knowledge and assent of the owners of the land to its use as a highway may be inferred from the open and notorious character of such use; and, *second*, that the use need not have been continuous and uninterrupted. The points made by appellant are fairly presented in the instructions given and refused. Those given clearly hold that the consent and knowledge of the land owners may be inferred from the character of the use of the land by the public for a highway, and the one refused presents the doctrine that public use of a highway, in order to create a right to the continuation of such use, must have been continuous and uninterrupted for the time prescribed by law.

II. We will proceed to consider the first question raised upon these instructions and discussed by counsel.

Counsel and the court below agree in the position that highways may be established in three ways, viz: 1. By proper proceedings under the statute; 2. by dedication of the owner

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of the land; 3. by prescription, that is, by long use and occupation by the public of the land as a highway.

But a public highway cannot be supported upon prescription, using the word in its technical sense. A prescription ^{1. HIGHWAY:} can only be for things which may be created by prescription. grant; it is allowed only to supply the loss of a grant. 2 Greenleaf's Cruise's Dig., p. 224 (Title XXXI, Chap. 1, § 11). There can be no grant to the public, therefore the public can hold no right by prescription. Prescription is a personal usage securing a right to one or more persons. Highways, or public ways, therefore, can never derive existence from prescription; a private way may. Angell on Highways, § 131; Bl. Com., book 2, p. 263-4; 2 Washburn's Real Prop., p. 450, § 4.

Long and uninterrupted occupation of land by the public as a highway is evidence of its dedication to public use. Upon evidence of this character may a highway be supported. Proof of like use of a private way, or other thing which may pass by grant, would establish a prescription and a right thereunder. It may be readily seen that, for these reasons, the term prescription, and probably the rules and doctrines applicable to estates held by prescription, have been applied to the tenure of the right of the public in a highway which rests wholly upon long use and occupation. That the term is now generally so used must be admitted, and it may be true that such general use has made it proper. We shall use it in the discussion of this case as applicable to a highway, the existence of which is based upon long and continuous use.

The distinction between dedication and prescription is this: The first is established by proof of an act of dedication and of the *animus dedicandi*, without reference to the period of use; in the second, long user is an essential ingredient.

III. We will now proceed to inquire whether long use alone will, in all cases, be sufficient to establish prescription.

A prescription for a highway is based upon the dedication of the land, as a prescription for a private way is founded upon ^{2. —: —:} a grant. 2 Greenleaf's Ev., § 539; 1 Greenleaf's *animus dedicandi*. Ev., § 17; Angell on Highways, § 131; Wash-

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burn's Easements and Servitudes, pp. 101 (66), 173 (127). In the first case, as we have seen, as well as in the last, long use of the land is evidence of a prior act of the owner whereby the land was made subject to the easement. The fact that the owner for a long time permitted the public, under a claim of right, to use the land, authorizes the inference that such use was commenced and continued with his assent. If the highway was opened and used with the assent or acquiescence of the owner, it will be presumed that he intended to dedicate the land to public use. The *animus dedicandi* is established by this evidence. But this assent, acquiescence and *animus dedicandi* cannot be presumed if the land owner was ignorant of the use of his property by the public. His knowledge thereof must be proved or there must be sufficient ground for the law to raise a presumption that he had information of the use to which his land was devoted.

Long continued notoriety of a fact is usually sufficient, when proved, to raise a presumption of law that persons affected thereby, or interested therein, had full notice of the matter. 1 Greenleaf's Ev., § 138. In the case of the use of one's land by the public for a highway, the fact of such use is a matter of interest to him, and affects the value and the enjoyment of his property.

But, in the case of wild and uninclosed land, the presumption would not so readily arise, and adding a further circumstance:—^{uninclosed}—:—of the non-residence of the owner, or the location of the lands at a distance from his place of residence, the law will not presume that the notorious use as a highway is known to the land owner. In uninclosed timber and prairie the corners and lines are often not marked. Owners are often ignorant of the boundaries of their land. In many instances they cannot, without the aid of a surveyor, determine whether a road is or is not upon their lands. To hold, therefore, that the notorious use of a highway raises a presumption of notice of its existence to the owner of the wild and uninclosed land upon which it is located would be contrary to experience and facts in many, if not most, instances. The use of every highway must be notorious; it is a public

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use, and necessarily open and notorious. Such use of a road as would make it public would be notorious. If this notoriety raises a presumption of notice on the part of the land owner, there could be no occupation of land by the public as a highway where such notice would not be inferred. It is our opinion that use of the land alone, if it be wild and uninclosed timber or prairie, will not raise a legal presumption of notice to the owner of the occupation of his land. We conclude, therefore, that user alone, of uninclosed and wild prairie and timber land, will not support a prescription for a highway. The doctrines upon which this conclusion is based, we think, are sustained by the following authorities: *Warner v. The President of the Town of Jacksonville*, 15 Ill., 237; *Watt v. Trapp*, 2 Rich., 136; *Harding v. Jasper*, 14 Cal., 642; *Hutlo v. Tindall*, 6 Rich., 396; *Hogg v. Gill*, 1 McM., 329; *Scott v. State*, 1 Sund., 629; *Hewins v. Smith*, 11 Met., 241; *Gibson v. Durham*, 3 Rich., 136; *Commonwealth v. Kelly*, 8 Gratt., 632; *Bethum v. Turner*, 1 Greenleaf, 111; *Stacy v. Miller*, 14 Mo., 478.

This court has made no decision in conflict with the conclusion we have just announced. Language may be found in *Onstott v. Murray*, 22 Iowa, 457, which will bear an interpretation not in accord therewith. And it is quite true that other language found in the same opinion agrees with our present views. The point presented for decision in that case involved the question whether use of uninclosed lands as a highway, with the knowledge and acquiescence of the owner, would support a prescription in the public, or raise a presumption of dedication. The question now before us, viz., whether notorious use of the land is a ground to infer knowledge by the land owner of the occupation of the public was not in that case. The acquiescence and, of course, knowledge of the owner were conceded to exist in that case.

The very point which we have above discussed, that, to support a dedication, the knowledge of the owner will not be inferred from user alone, was in *Daniels v. The C. & N. W. R. Co.*, 35 Iowa, 129. Our present decision is in accord with the opinion in that case.

Ross v. McQuiston.

In discussion of questions pertaining to the dedication of, or prescriptions for, highways, language has been used by this court to the effect that use of the land is evidence of dedication without any reference to the point now before us. Such language cannot be fairly construed to mean that use of land will, in all cases, raise a presumption of knowledge of such use. See *Manderschid v. City of Dubuque*, 29 Iowa, 73.

We conclude that the instructions given to the jury, which we have above considered, failed to present correct rules of law applicable to the case. As for this error the judgment must be reversed, other questions discussed by counsel need not be considered.

REVERSED.

Ross v. McQUISTON ET AL.

45	145
93	597
93	604

45	145
112	442

1. **Practice in the Supreme Court:** VERDICT: EVIDENCE. A finding of fact by the court below does not require a preponderance of evidence to sustain it on appeal, but it will not be disturbed if it is supported by any evidence, and is not the result of passion or prejudice.
2. **Insanity: PROOF OF: CONFESSION.** Upon the trial of an issue of insanity, all the facts connected with the personal history of the person alleged to be insane are competent evidence, and his own confession that for a long period, including the time in question, he had been of unsound mind, is admissible.
3. _____: ____: WILL. Another will than the one in controversy, executed when the testator was confessedly insane, is admissible to rebut the presumption of sanity arising from the form or character of the will offered for probate.

Appeal from Allamakes Circuit Court.

TUESDAY, DECEMBER 12.

THE plaintiff, who is sole devisee and legatee therein, and named as executor, filed a will of A. S. Ross for probate in the Circuit Court of Allamakee county. The defendants resisted the probate of the will on the ground that at the time of its execution the decedent was not of sound mind, and upon a

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trial of the cause to the court it was so found, and a judgment accordingly was entered. Plaintiff appeals.

Dayton & Dayton, for appellant.

Stoneman & Chapin and *M. B. Hendrick*, for appellee.

BECK, J.—I. This action, not being in chancery, cannot be tried here *de novo*, but must be reviewed upon errors assigned on the record. *Leighton v. Orr*, 44 Iowa, 679; *Sisters of Visitation v. Glass*, p. 154, *post*.

Plaintiff's assignment of errors presents two grounds of objection to the judgment of the court below. They require but brief consideration.

It is first insisted that the judgment of the Circuit Court is against the evidence. The conclusion reached by the court below, that at the time the will was executed the decedent was insane, appears to us to be supported by the strong preponderance of the evidence. The plaintiff does not contest the fact that at certain periods of his life the decedent was insane, and that his mental disorder was of such character that there could be no mistake in reaching the conclusion that he was of unsound mind, and not competent to make a will. The decided preponderance of the evidence is that at the time the will offered for probate was executed he was in that condition. Plaintiff endeavors to show from the testimony that the witnesses testifying to the insanity of the deceased were mistaken in fixing the time at the date of the will. It is argued that he was sane at that time, and subsequently insane. While there is some foundation for this theory, it is not, by any means, satisfactorily supported by the evidence. But we are not required to hold that the judgment of the court is in accord with the preponderance of the evidence, in order to support it. Under familiar rules prevailing here, it cannot be disturbed unless so unsupported by the evidence that a presumption is raised to the effect that the finding of the court below was the result of passion or prejudice, and not the result of the honest exercise of the discretion of the judge. There is no ground upon which such a

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presumption can rest. The judgment, therefore, cannot be reversed because unsupported by the evidence.

II. Evidence was admitted, against plaintiff's objection, showing the condition and conversations of the intestate just ^{2. INSANITY: before his death.} He appeared, as the witnesses ^{proof of: con-} fessions. testify, sane—more rational than they had ever known him. In this conversation he declared that he had not been in his right mind for twenty years. Other evidence was admitted, under like objection, showing that he had made another will some years before his death, at a time when he was unquestionably insane. His conversation and declarations in regard to it, and the will itself, were admitted in evidence. All this evidence, it is now argued, was erroneously admitted.

The issue involving the sanity of the deceased was determined upon evidence presenting quite fully his history for more than twenty years. It was also shown that his mother and other members of his family were insane. For most of the time covered by this evidence he had been employed in business, and the plaintiff claims that while so employed he was of sound mind. The facts connected with his personal history were properly admitted in evidence, and considered upon the issue of sanity. His deportment, conversation and acts were competent to show his condition of mind. Whatever would throw light upon the issues of the case was properly admitted. The circumstance that the deceased when sane expressed the opinion that for twenty years past, and prior to the date of the will, he had been of unsound mind surely is competent as tending to prove his insanity.

The will made while he was insane, and his conversation in regard to it would, with other evidence, tend to rebut the ^{a. —: —: will.} presumption of sanity arising from the form or character of the will offered for probate, if any such presumption could be exercised or should be claimed. The two papers differ but little in form, and exhibit equal intelligence and capacity. In the disposition of the property of deceased is found the only difference in the two instruments.

The conclusion would be justified that if, while unquestion-

The State v. Finn.

ably insane, the decedent executed intelligently a will, it cannot be claimed from the fact that the will offered for probate appears to be the work of a rational mind that he was sane when he executed it.

No other questions are presented by the record, or discussed in the arguments of counsel. The judgment of the Circuit Court is

AFFIRMED.

THE STATE v. FINN.

1. **Pleading: AMENDMENT.** An amended petition is not a substitute for the petition first filed, and the averments of the latter, in so far as they are not modified or withdrawn by the amended pleading, will stand.

Appeal from Winneshiek District Court.

TUESDAY, DECEMBER 12.

ACTION upon a bond conditioned for the appearance of one Ole Evenson to answer a criminal charge. The facts are sufficiently stated in the opinion.

E. E. Cooley, for appellant.

O. J. Clark, for appellee.

SEEVERS, CH. J.—The petition, after making averments showing that Ole Evenson was legally required to furnish security for his appearance, proceeds as follows: "Thereupon the said defendant as aforesaid gave a bond for his appearance as follows." A copy of the bond is then given, which purports to be signed by Evenson and the defendant, and recites that "We, Ole Evenson and John Finn, undertake," etc.

Afterward, what is called an amended petition was filed.

The defendant demurred to the amended petition on the ground there was no allegation therein that the defendant made the bond therein referred to, and that it was not averred the defendant bound himself for the appearance of Ole Evenson. This demurrer was overruled.

Chamberlin v. Wilson.

It is urged by appellant that what is called an amended petition is a substitute for the original petition, and takes its place. In this view we do not concur. The ^{1. PLEADING:} ~~amendment.~~ amended pleading does not state that it was intended as a substitute for the original. On the contrary, it refers thereto, and it is evident it was not designed as a substitute, nor intended to take the place of the original petition.

The name given to a pleading is not conclusive, but the statements or allegations therein, taken as a whole, must be looked at in determining its character.

It is also urged that, taking the petition and amendment thereto, it is not distinctly alleged defendant executed and delivered the bond in question. The averment is that the defendant Oleson gave a bond, a copy of which is set out, and which recites that Oleson and defendant are bound, and purports to be signed by Oleson and defendant.

On demurrer we are of opinion this is sufficient. Substantially, the allegations taken together amount to an averment that defendant executed the bond.

AFFIRMED.

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CHAMBERLIN v. WILSON ET AL.

1. Administrator: CONFLICT OF JURISDICTION: POSSESSION OF NOTE.
Where an administrator is appointed in the jurisdiction where decedent resided, he becomes the principal and primary administrator, and is entitled to the possession of a note which had been the property of decedent, notwithstanding the subsequent appointment of another administrator in the county where the real estate is situated which was mortgaged to secure the note.

Appeal from Jackson Circuit Court.

TUESDAY, DECEMBER 12.

This cause is submitted upon an agreed statement of facts, as follows: "That Merrick G. Chamberlin died at Polk county, State of Nebraska, on the 15th day of June, 1874,

Chamberlin v. Wilson.

being at the time of his death a citizen of said county; that at the time of his death he had in his possession a note made by Pierce Cahill, a resident of Jackson county, State of Iowa, secured by mortgage on real estate in said county of Jackson, of which said Merrick G. Chamberlin owned one-half, and his daughter-in-law, Sarah C. Chamberlin, owned one-half, payable to their order, or bearer; that after the death of said Merrick G. Chamberlin, John Van Horn took out letters of administration (or letters testamentary, a copy of which is hereto annexed), in Polk county, Nebraska, and in his inventory reported the note in question among the assets which had come into his possession, and took the possession of said note. Said John Van Horn sent said note to John Wilson, the defendant in this case, for collection, and the said defendant collected the sum of \$133.35 thereon, and has the same in his hands ready to pay over to the party entitled thereto, less the amount of his costs and charges; that Nelson S. Chamberlin, son of the decedent, took out letters of administration from the Circuit Court of Jackson county, on the — day of —, A. D. 1875, and entered upon the discharge of his duties as such administrator. Said letters were issued by the clerk in vacation, and there was no order of the court approving the same. Said administrator resides in Jackson county, Iowa, and the said decedent resided in said county of Jackson until about one year prior to his death, when he removed to Polk county, Nebraska, and resided there until his death. That said N. S. Chamberlin, as administrator, demanded the said money from said Wilson, who refused to pay, and thereupon this action was brought.

"Said John Van Horn, as executor, filed his petition as intervenor, claiming the said money as executor or administrator, and on demurrer judgment was rendered against him.

"John Van Horn afterwards filed his petition of intervention, claiming the money as his own, individually, in his own right. Certain residents and citizens of Jackson county have filed their claims with the plaintiff against said estate, among others the county of Jackson, which claims about \$43.85, for delinquent tax on personal property, and said claims have

Chamberlin v. Wilson.

been admitted by the administrator, but have not been acted upon by the court; nor does the said Van Horn admit the validity of said claims against the deceased; that the costs and expenses of said John Wilson amount to \$5.00." The letters testamentary issued to said Van Horn bear date July 23d, 1874, and show that they were issued pursuant to an appointment of said Van Horn executor of the last will and testament of Merrick G. Chamberlin, deceased. The court rendered judgment in favor of plaintiff against Wilson for \$128.35, and against Van Horn for costs. Van Horn appeals.

Levi Keck and Ellis & Spence, for appellant.

Graham & Cady, for appellee.

DAY, J.—Pursuant to appointment in the testator's will, letters testamentary were duly issued by the Probate Court of Polk county, Nebraska, the county of decedent's residence, to Van Horn, on the 23d day of July, 1874. Letters of administration were issued to note. Nelson S. Chamberlin, the plaintiff, by the clerk of the Circuit Court of Jackson county, Iowa, in the year 1875. The administration granted to Van Horn, at the place of the domicile of the deceased, is the principal and primary administration. The administration granted to plaintiff, in Jackson county, even if regularly and properly granted, is merely ancillary in its nature, and is subordinate to the original administration. Story on Conflict of Laws, Sec. 518, and authorities cited. Van Horn took actual possession of the note in question, and embraced it in his inventory of the assets of the estate. Being charged with the principal and primary administration of the estate, and having taken actual possession of the note, he was entitled to the further control of it and of its proceeds. He did not lose this right of control by sending it to Jackson county for collection. He may, in our opinion, maintain an action against Wilson for the proceeds of the note collected and in his possession, in his own name, without taking out new letters of administration. Probably, under the doctrine of *McClure v. Bates*, 12

Sawyer v. Meyer.

Iowa, 77, he might not be enabled to maintain an action as administrator for the collection of the note. But the note came rightfully into his possession, in virtue of the administration granted in Polk county, Nebraska. It was collected and the proceeds were in the hands of Wilson, so that the right to maintain an action upon the note is not involved. The plaintiff is endeavoring to divest Van Horn of his possession of the note, or, which is the same thing in legal effect, of its proceeds, and to prevent this he may sue in his own name and right personally. Story on Conflict of Laws, Sec. 516, and authorities cited. The judgment of the court below is erroneous.

REVERSED.

SAWYER V. MEYER ET AL.

1. **Street: VACATION OF: BURDEN OF PROOF.** In an action to enjoin the vacation of a street the plaintiff has the burden to establish the fact that he has rights which are abridged thereby.

Appeal from Winneshiek Circuit Court.

TUESDAY, DECEMBER 12.

ACTION in equity to set aside the vacation of a street and to enjoin defendants from obstructing the same. The facts are stated in the opinion. Decree for plaintiff; defendants appeal.

L. Bulis, for appellant.

G. L. Faust, for appellee.

ADAMS, J.—The plaintiff is the owner of certain lots in Brooks' second addition to the town of Ossian, Winneshiek county. The defendant, Meyer, is the proprietor of a part of said addition, and on the 5th day of January, 1874, he vacated the same, including a part of a street called Brooks street. Several lots in the addition had been sold to different persons,

Sawyer v. Meyer.

but none of them joined in the instrument of vacation, and the plaintiff claims that his rights and privileges in the addition were abridged and destroyed by the vacating of a part of said Brooks street. The defendant, Hening, is a grantee from Meyer of a part of the street.

The question in this case is as to whether the plaintiff's rights or privileges were abridged or destroyed, as he alleges.

1. STREET: The testimony was given in reference to the plat ^{vacation of:} ~~burden of~~ of the addition, which the witnesses had before ^{proof} them, and which plat does not appear to have been introduced in evidence. Without it, the testimony is for the most part unintelligible. The plaintiff does, however, say: "It is a direct line to my pasture; I can go to my stock-yards through here, otherwise I would have to go around."

Assuming that the plaintiff is testifying in regard to Brooks street, we get a definite idea. He means to say that he needs the street in question to travel upon in going to his pasture and stock yards. But we are still in the dark upon a vital point in the case. Did he own the pasture and stock yards when the street was vacated? The defendants claim that he did not. The evidence does not show what the fact is. The burden is upon the plaintiff to prove that he had rights at the time the street was vacated which were abridged by such vacation; but the evidence does not show that he owned any land inside or outside of the addition at that time. He does indeed say, "I built here two years ago last April." He means, we think, in April, 1873. But building a house is hardly evidence of the ownership of the land on which it is built.

The evidence fails to satisfy us that the plaintiff had rights as the proprietor of a lot or lots in said addition which were abridged by the vacation of the street.

REVERSED.

Sisters of Visitation v. Glass.

SISTERS OF VISITATION ET AL. v. GLASS ET AL.

1. **Will: PRACTICE: TRIAL DE NOVO.** A proceeding for the probate of a will is not an equitable action triable *de novo* in the Supreme Court.
2. **—: PROBATE OF: ACTION.** Such an action is a special proceeding, triable in the Circuit Court as an ordinary proceeding, and it follows the rule governing ordinary proceedings in regard to the manner of appeal and trial in the Supreme Court.
3. **—: EVIDENCE: TESTIMONY OF PROPONENT.** One of the proponents of a will cannot be permitted to testify respecting conversations with the testator, even though his testimony be offered not in his own behalf, but for the other proponents.
4. **Practice: FINDING OF COURT.** In all actions and special proceedings not triable *de novo* in the Supreme Court, the finding of the court stands as the verdict of a jury, and will not be set aside if there is any evidence by which it can be supported.

Appeal from Lee Circuit Court.

TUESDAY, DECEMBER 12.

THE appellants and proponents are legatees under the will of Bernard Slaven, and filed the will in the Circuit Court, and asked that it be admitted to probate.

The appellees and contestants, claiming to be heirs at law of said Slaven, appeared and objected to the probate, alleging that at the time of the execution of the will said Slaven was of unsound mind, and incapable of making a will, and that the same was made and obtained through duress and undue influence. There was a trial by the court. No special finding of facts was made, but the court "found and adjudged that said papers purporting to be the last will and testament of Bernard Slaven is not such last will and testament of Bernard Slaven, deceased, and that he died intestate leaving no last will and testament." The proponents appeal.

Miller & Sons, Craig & Collier and G. W. McCrary, for appellants.

Gillmore & Anderson, for appellees.

Sisters of Visitation v. Glass.

SEEVERS, CH. J.—I. The appellees object that there cannot be a trial *de novo* in this court. Such a trial is guaranteed by 1. WILL: prac- the Constitution in equitable actions, provided the tice: trial de novo. mode and manner prescribed by statute has been followed in the trial below, and the necessary steps taken and preserved to obtain such trial in this court. *Sherwood v. Sherwood*, 44 Iowa, 192.

This, however, is not an equitable action, and was not so regarded at the time the Constitution was adopted. 1 Story's Eq. Jur., §§ 184, 218; *Leighton v. Orr*, 44 Iowa, 679.

II. It is, however, insisted that the Code gives such a trial in cases where all the evidence has been properly certified 2. ——: pro- up to this court, and it is further insisted that this bate of: ac- is not a civil action because it is not a "proceeding in a court of justice in which one party known as the plaintiff demands against another party known as the defendant the enforcement or protection of a private right, or the prevention or redress of a private wrong (Code, § 2505), but that this is a special proceeding. Code, § 2506. Conceding this to be a special proceeding the difficulty is by no means solved, for the reason that it remains to be determined how or in what way the issues in special proceedings are to be tried.

There are but two kind of issues, one of law and the other of fact, whether the action be ordinary, equitable, or in the nature of a special proceeding. Code, § 2737.

The Code does not provide or define how the issues in a special proceeding shall be tried in the Circuit or District Courts. But it does provide how issues of fact in ordinary and equitable actions shall be tried in such courts, and the general rule is that in both classes of actions the trial shall be upon oral evidence taken in open court, and that upon appeal to this court only the legal errors duly assigned can be heard and determined. Code, §§ 2740, 2741.

There being no special provision for the trial of issues of fact in the class of actions denominated special proceedings, it follows that such issues must be tried in the Circuit and District Courts as an ordinary or equitable proceeding, and the mode of trial will be determined by assigning the proceeding

Sisters of Visitation v. Glass.

to whichever class it appropriately belongs. Having determined this is not an equitable proceeding, it was properly tried in the court below as an ordinary proceeding or action at law.

The general rule being that all actions and proceedings of every character can only be heard or tried in this court upon "legal errors duly presented," it becomes necessary to ascertain whether there are any exceptions thereto, and here we have no difficulty.

Section 2742 of the Code, in connection with the constitutional provision, provides for the trial of equitable actions *de novo* in this court, and this constitutes the *only* exception to the general rule.

This view is not in conflict with Code, § 3170. This section secures a review in this court in an ordinary proceeding tried to the court, when no finding of facts has been made, in all cases when the evidence has been properly certified up to this court. But it does not obviate the necessity of an assignment of errors, one of which may be that the finding of the court is against the weight of the evidence. Such an assignment of error would be considered and determined by us. The rules governing the court in such cases will be presently considered.

In equitable actions triable *de novo* in this court, no assignment of errors is required, and we consider the testimony, and determine the questions of fact presented, as in our judgment the proof preponderates, without giving any weight whatever to the finding and judgment of the court below.

The question we have been considering has not, we believe, been expressly decided by this court; certainly it was not in *Williams v. Williams*, 36 Iowa, 693, or in *Johnson v. Semple*, 31 Iowa, 49; it was held in both of these cases that viewing the actions as at law, and giving to the findings all the presumptions incident thereto, the evidence was not sufficient, and the findings were set aside.

III. We now proceed to a consideration of the errors assigned. The first is that the court erred in refusing to permit one of the proponents to testify in the case. ^{3. EVIDENCE:} He drafted the will, was named as a devisee

Sisters of Visitation v. Glass.

therein, and was offered as a witness in "behalf of the other devisees only, and it was proposed to be proved by him that said Slaven of his own free will and choice made the bequests to the other devisees, and that neither the witness nor any one else, to his knowledge, requested said Slaven to make said bequests, and that he wrote said will upon request of said Slaven, and just as he directed, and used no influence to induce said Slaven to give or make said bequests."

The contestants testified as to their relationship to the deceased, and to facts tending to so prove, and nothing more. This does not authorize or permit one of the proponents to testify to the matters proposed to be proved by him. He is clearly within the prohibition, and his standing or that of the case is not such as to bring him within the exceptions of Code, § 3639. *Canaday v. Johnson*, 40 Iowa, 587.

IV. The remaining errors assigned amount to this, that the finding of the Circuit Court in refusing to probate the will is against the weight of evidence.

We regard the rule as well settled, and at this day not open to controversy, that, in all actions or special proceedings not triable ^{4. PRACTICE:} de novo in this court; the finding of a court ~~finding of fact~~ upon a question of fact stands as the verdict of a jury, and cannot be set aside if there be any evidence upon which it can be supported. *Hamilton v. Iowa City National Bank*, 40 Iowa, 307.

Although we might conclude as an original question that the weight of the evidence was against the finding, still we cannot interfere; such was the ruling in a similar case in *Havelick v. Havelick*, 18 Iowa, 414, where it is said: "Was the verdict against the evidence? Not so clearly so as to warrant a reversal. There was a mass of testimony, some of it conflicting, upon a subject very difficult to determine. That the jury might not have reached fairly and consistently the opposite conclusion, may be admitted. But the most that can well be claimed is that the case upon the testimony is one of doubt, and the verdict cannot therefore be disturbed." What was said in that case is applicable to this; the issues are the same.

Gray v. Myers.

In the case at bar there was evidence tending to show that Slaven, at the time the will was executed, was insane; and that the will was obtained by reason of undue influence, and the court below must have found one or both of these propositions to be true.

The evidence was conflicting, and the witnesses were examined orally in the Circuit Court. Therefore the demeanor of the witnesses while testifying had an important bearing in determining their credibility.

AFFIRMED.

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GRAY v. MYERS.

1. **Practice: PLEADING: DEMURRER.** Where leave has been granted for an extension of time in which to file an answer, it is within the discretion of the court to permit a demurrer to be filed, and the action of the court will not be reversed unless it be shown that there was prejudicial error in the ruling.
2. **Administrator: AUTHORITY OVER REAL ESTATE.** Unless the personality is insufficient for the payment of debts, the administrator has nothing to do with the realty, which descends to the heirs at law.

Appeal from Linn District Court.

TUESDAY, DECEMBER 12.

THIS is an equitable proceeding, and the plaintiff's right to recover is based on the following facts as stated in his petition: That plaintiff is administrator of James M. Berry, deceased, who, in his lifetime, was the owner of certain real estate described in petition; that the same had been sold for taxes, and to redeem therefrom Berry borrowed the sum of five hundred dollars, defendant going his security for the re-payment of said money; that, to indemnify defendant against loss or damage by reason of said suretyship, the tax certificate was assigned to defendant, and he gave to Berry a bond agreeing to convey him said premises provided defendant did not have to pay the borrowed money; that said bond was left with one Stephens, and that defendant has obtained possession

Gray v. Myers.

thereof, and refuses to convey the premises, although he never has been compelled to pay said borrowed money or any portion thereof; the same having been paid by Berry in his lifetime.

The prayer of the petition is that defendant be compelled to convey to plaintiff as administrator aforesaid, the real estate described in petition. To this petition defendant demurred, which being sustained the plaintiff appeals.

Thompson & Davis, for appellant.

Preston & Son, for appellee.

SEEVERS, CH. J.—I. The abstract states that on Oct. 19, 1875, the defendant appeared and asked leave to file his answer 1. ^{PRACTICE:} ~~pleading: de-~~ in thirty days, whereupon the court continued the murrer. cause, and ordered the defendant to answer in thirty days. On the 31st day of December, 1875, the defendant instead of answering demurred.

On the 14th day of March, 1876, the plaintiff filed a motion to strike the demurrer, because under the order of the court an answer only could be filed, and that neither an answer or demurrer was filed within the time prescribed by the court. This motion was overruled.

In *District Township of Newton v. White*, 42 Iowa, 608, we sustained the action of the court below in striking from the files a demurrer where leave had been given to answer in thirty days, and we must affirm the action of the court in the case at bar in this respect, because, 1. These matters are, and must of necessity be, largely within the discretion of the District Court. Before we can reverse the ruling below on questions like this, the abstract should show all the facts and circumstances surrounding the transaction, and that there was prejudicial error in the ruling. It is somewhat difficult to conceive how there could be such error where the demurrer (as in this case), raises the question that, conceding all that is said in the petition to be true, the plaintiff is not entitled to the relief demanded. If the demurrer had been on some ground that would have been regarded as waived in case an answer had been filed, this might present a different question.

Sexton v. Henderson.

2. The abstract fails to state any facts except those above stated, and it fails to state there were no other facts or matters presented to the court upon the hearing of the motion. Error must be affirmatively shown, and we must indulge in the presumption, when the contrary does not appear, that there were matters before the court which warranted the ruling.

II. The demurrer is grounded on the fact that by his own showing the plaintiff is not entitled to recover, for the reason that as administrator he has no right to hold or ~~ADMINIS-~~ ~~TRATOR: au-~~ have vested in him the title to said real estate, ~~thority over~~ under the facts stated in the petition.

Unless it be necessary to be sold for the payment of debts, the administrator has nothing whatever to do with the real estate, but it descends to the heirs at law. That this real estate might in some proper proceeding have been charged with the payment of debts if there was not sufficient personality for this purpose, we can readily conceive. But such is not the object of the action, nor is it averred there are any debts, or that the personality is insufficient. We are therefore of opinion the demurrer was properly sustained. *Kinsell v. Billings*, 35 Iowa, 154.

AFFIRMED.

SEXTON v. HENDERSON ET AL.

1. **Tax Sale: PAYMENT OF TAXES BY PURCHASER: RECOVERY FOR.** Where the holder of a tax title adjudged to be invalid has paid taxes upon the land, while the patent owner remained in possession, he is entitled to recover therefor, and the measure of his recovery is the amount which the owner would have been compelled to pay the treasurer if the taxes remained unpaid.

Appeal from Warren Circuit Court.

TUESDAY, DECEMBER 12.

ACTION in equity to recover for certain taxes, with penalty and interest, paid by plaintiff on land in Warren county while he held a tax deed to the land.

Sexton v. Henderson.

The patent title was held by one John M. Laverty, the defendant's testate. After the reordering of the tax deed, Laverty held possession of the land for more than five years, and having died his executors obtained a decree canceling the deed. The plaintiff then brought this action to recover for taxes paid with penalty and interest. The Circuit Court dismissed his petition, and he now appeals.

Bryan, Maxwell & Seevers, for appellant.

Henderson & Berry, for appellee.

ADAMS, J.—It is claimed by the defendants that if the plaintiff paid the taxes upon the land as he alleges, and ^{1. TAX SALE:} under such circumstances as he alleges, he did ^{payment of taxes by purchaser: re-} but pay his own taxes, and that he cannot now ^{recover for} recover the same of them. It is doubtless true that the right of a holder of a tax deed to recover for taxes paid where the tax deed is held to be invalid is based upon the theory that he had discharged an obligation of the owner of the land, and it being an obligation which the law invited him to discharge by purchasing at the tax sale, the owner of the land should reimburse him. If a person pays his own taxes and afterwards loses by adverse possession the land upon which they were assessed, he must lose the taxes also. But the case at bar involves an entirely different principle. The land upon which the taxes were paid must be regarded as having belonged all the time to the defendants' testate. He was the holder of the patent title, and remained in possession. There is no pretense that he was divested of his title unless he might have been by the tax deed; and there is no evidence and cannot be any evidence that he was divested by that. That the validity of the tax deed could never be asserted is precisely what was adjudicated, and the adjudication is not now questioned by either party.

It may be said, indeed, that the plaintiff avers in his petition that the tax deed and sale were regular and perfect in every particular. Whether they were or not is a question into which we cannot now inquire except so far as may be

Sexton v. Henderson.

necessary to justify us in finding that the taxes were paid in pursuance of a sale. The averment must be taken in connection with another averment in the petition that in the suit brought by these defendants against the plaintiff setting up that Laverty held possession of the premises for more than five years after the tax deed was recorded the court decreed that the deed should be canceled and the title quieted in these defendants. The petition, taken altogether, shows that the validity of the tax title can never be inquired into by any court. The court so held in the said action brought by these defendants, and upon that holding based its decree. As it has never been successfully asserted, and never can be, we must hold that there is no evidence which we can recognize that Laverty's title was ever divested. That the plaintiff bid at the tax sale, paid the tax in pursuance of it, acquired a tax deed and paid taxes as the holder thereof, is proven; and that is as far as we can inquire. The deed having now been canceled, and the title quieted in these defendants, we think the plaintiff is entitled to be reimbursed for taxes paid.

It is claimed by the appellees that this question of the right to recover for taxes paid was adjudicated in the former suit. But the decree does not so show.

It is also claimed that the plaintiff's cause of action, if any, is barred by the statute of limitations. But the statute is not pleaded.

The only remaining question is as to the amount which the plaintiff is entitled to recover. In *Everett v. Beebe*, 37 Iowa, 452, it was held that while the tax deed did not pass the title of the owner of the land, it did have the effect to pass "all the right, title, interest and claim of the State and county." We see no reason why the tax deed should not have that effect in this case.

In the case above cited it was held that the amount which the owner should pay the purchaser is the amount which would have been due the treasurer if the taxes had not been paid by the purchaser. That we believe to be the correct rule in this case. It may be said, indeed, that such rule imposes

Westphal, Hinds & Co. v. Moulton.

a hardship upon the owner of the land, because while there was an outstanding tax title he could not pay the taxes. But these defendants obtained a decree against the plaintiff, canceling the tax deed on the ground that the tax title had never been asserted, and that, after the lapse of such time as had elapsed, the validity of the tax deed could not be inquired into. The defendants cannot, therefore, say that they were precluded from paying the taxes on account of the tax title held by plaintiff. To justify us in so holding it would be necessary for us to find that the tax title was valid. But the defendants have taken the ground, and have been sustained in it, that no court can so find.

For the purposes, then, of this case, we must presume, whether true or not, that Laverty remained the owner of the land and could have paid the taxes, but neglected to do so. If any hardship results to the defendants, it is incident to the way in which they have seen fit to assert their rights.

We are of the opinion that they should pay the plaintiff what would have been due the treasurer if the taxes had been paid by no one. The tax of 1869 was paid by Laverty. For that the plaintiff cannot recover.

REVERSED.

WESTPHAL, HINDS & CO. v. MOULTON.

1. **Guaranty: WHAT CONSTITUTES.** In response to an order for goods, plaintiffs replied that they would not deliver them unless the purchaser would procure some one to guarantee payment for them; the purchaser answered, stating that defendant had offered to assist him, and defendant indorsed upon the letter his agreement to the proposition: *Held*, that he was liable as guarantor.

Appeal from Jones Circuit Court.

TUESDAY, DECEMBER 12.

THE plaintiffs aver in their petition, in substance, that on or about the 10th day of June, 1874, one J. A. Derbins ordered

Westphal, Hinds & Co. v. Moulton.

of the plaintiffs a bill of goods amounting to the sum of \$209.70, on 60 days' time; that plaintiffs refused to sell or deliver said goods to said Derbins, on time, unless the said Derbins would get some one to guarantee their payment; that to induce plaintiffs to sell and deliver said goods to said Derbins, the defendant, M. M. Moulton, on the 17th day of June, 1874, made to plaintiffs his written guaranty of payment for said goods in sixty days, a copy of which is attached marked "Exhibit A"; that in pursuance of said guaranty, and in consideration thereof, the plaintiffs sold to said Derbins and delivered to him said bill of goods, amounting to the sum of \$209.70, on or about the 17th day of June, 1874, an itemized statement of which is attached, marked "Exhibit B."

"Exhibit A" is in the following words:

"MONTICELLO, Iowa, June 17, 1874.

"MESSRS. WESTPHAL, HINDS & CO.

"In answer to yours, in regard to a guarantee of payment in 60 days for bill goods ordered.

"Mr. M. M. Moulton has offered to assist me; if satisfactory please ship goods.

Yours,

J. A. DERBINS.

6-17-1874.

I agree to the above.

M. M. MOULTON."

To the above is attached, as "Exhibit B," a bill of the goods.

The defendant demurred to the petition on the ground that it sets up an agreement by the defendant to pay the debt of another, and it does not appear that the agreement is in writing.

The court overruled the demurrer. Judgment for plaintiffs. Defendant appeals.

Keeler & Keeler, for appellant.

Monroe & Herrick and Fockler & Longueville, for appellees.

Westphal, Hinds & Co. v. Moulton.

ADAMS, J.—The letter of Derbins attached to plaintiffs' petition as "Exhibit A" refers to a letter written by plaintiffs ^{1. GUARANTY:} to Derbins, and also to the bill of goods which ^{what consti-} ^{tutes.} had been ordered. It is claimed by the appellant that his contract, whatever it was, can be gathered only from the three papers. If we should concede this to be the fact, it would not appear that his contract was not in writing, but only that the whole writing was not set out.

We are of the opinion, however, that the writing which embraces his contract was set out. It is found in the letter of Derbins, and the defendant's indorsement, and the bill of goods.

It is contended, however, by the defendant, that the plaintiffs' letter to Derbins is necessary, because otherwise the terms of the guaranty do not appear; and he argues that it may be that the plaintiffs demanded two guarantors. To this it is sufficient to say that if the plaintiffs did demand two guarantors, Derbins, in the letter which the defendant indorsed, proposed to give but one guarantor, and asked plaintiffs to ship the goods if that one guarantor was satisfactory; and defendant agreed to be that one guarantor, and the goods were shipped.

It is further urged that an agreement to assist Derbins was not an agreement of guaranty made to the plaintiffs. But defendant's indorsement is written upon a letter to the plaintiffs, and the assistance referred to must mean the assistance which plaintiffs required Derbins to get; that is, the assistance of a guarantor.

Finally, it is said that perhaps plaintiffs required a guaranty by the guaranty of a promissory note. That, to our mind, is not the fair intendment of the letter which the defendant indorsed. Whatever the plaintiffs required, the goods were shipped upon the strength of that letter.

The judgment of the Circuit Court is

AFFIRMED.

The City of Decorah v. Kesselmeier.

45 166
99 641

45 166
119 117

THE CITY OF DECORAH V. KESSELMEIER ET AL.

1. **Contract: INTERPRETATION OF.** The doctrine of surplusage does not apply to contracts, and while words which are meaningless may be disregarded, those which have a meaning must be considered in ascertaining the intention of the parties.
2. _____: **BOND.** A bond provided for a forfeiture if the defendant should sell "any vinous or malt liquors to any intoxicated, card-playing, whatsoever person or habitual drunkard": *Held*, that it was intended to prohibit the sale to an intoxicated *and* card-playing person.

Appeal from Winneshiek Circuit Court.

TUESDAY, DECEMBER 12.

ACTION at law originally brought in the mayor's court of the city of Decorah upon a bond executed by defendants upon the city issuing to the principal in the bond a license to sell ale, beer and wine. Defendants appealed from the judgment of the mayor to the Circuit Court, and from another judgment there they appeal to this Court. Other facts of the case appear in the opinion.

Charles P. Brown, for appellant.

C. Wellington, for appellee.

BECK, J.—The condition of the instrument upon which this action is brought is in these words: "Now if the said Ed. ^{1. CONTRACT: Kesselmeier shall not suffer any gambling for interpretation of.} money or other thing, nor any drunkenness or disorderly conduct, nor sell or deliver any vinous or malt liquors to any intoxicated, card-playing whatsoever, person or habitual drunkard, or to any minor without the written consent of his parent or guardian, in the said building, nor in any room connected therewith, then this bond to be void, and otherwise in force; but it is expressly stipulated that for every breach of the foregoing conditions, or of either of them, the said Ed. Kesselmeier shall pay to the said city of Decorah the sum of \$100.60, to be collected on this bond, with costs

The City of Decorah v. Kesselmeier.

of suit, by civil action, if necessary, in any court having jurisdiction thereof."

The evidence shows that the principal in the bond had sold a glass of beer to an intoxicated person, which plaintiff claims was a violation of the conditions of the bond. The language of the instrument above quoted, which expresses the condition alleged to have been broken, is not only inaccurate, but when all the words are considered together one of them, at least, fails to express any meaning. Leaving out the word "*whatsoever*" the meaning of the clause is clear that the obligation of defendants is violated by the sale of liquors to "any intoxicated, card-playing person." Retaining the word, a different idea is not expressed, and no force is given to the thought expressed without it. The word is therefore meaningless, and may be disregarded. When omitted, the sense of the language is clear; when not, it does not destroy the sense, for it is meaningless. It has the effect, simply, of a useless word; it delays comprehension of the thought expressed. If we transpose it so it will follow the word *person*, it adds force to the sentence, but does not change its meaning. This, probably, we may not do. But as it is meaningless, standing where it does, we may disregard it, or rather read it as a word having no meaning in the connection where it is found.

But the words "card-playing" are not so to be treated. They are not meaningless. Their meaning is not inconsistent with words preceding or following, and they cannot, therefore, be disregarded. 2 Parsons on Contracts, 26, and notes.

Counsel for plaintiff insists that the words should be regarded as surplusage. But if they have a meaning, this we cannot do without disregarding the very intention of the parties to the contract. That intention is expressed by the words the parties have chosen, and if words having a meaning are disregarded an interpretation of the contract is thereby given different from the real intention of the parties. No rule of interpretation will permit this. The doctrine of surplusage applies to pleadings, not to contracts.

The rules of our language require the copulative "*and*,"

The S. C. & St. P. R. Co. v. The County of Osceola.

and not the disjunctive conjunction "or," to be understood after the word "*intoxicated*." We cannot violate the rules of grammar in order to arrive at an intention of parties to a contract which would appear more sensible to us than the intention expressed by the language used by them.

We may fail, too, to understand the reasons upon which the conditions of a contract are based. But that is a matter ^{2. — : — :} for the parties alone. Courts cannot modify contracts so that they shall appear always sensible. The intention of the parties to the bond in suit to restrain defendant from selling beer and wine to intoxicated persons who play cards may have been based upon some reason satisfactory to themselves. Certain it is they have expressed such an intention. It is our duty to construe the bond in accord with that intention.

As there was no proof showing that the beer was sold to an "*intoxicated, card-playing person*," the court erred in finding that the conditions of the bond were violated, and in rendering judgment for plaintiff.

REVERSED.

THE S. C. & St. P. R. Co. v. THE COUNTY OF OSCEOLA ET AL.

45	168
82	9
45	168
86	338
46	168
98	583
98	647
46	168
113	417

1. **Judgment Bonds: INNOCENT HOLDERS: NEGOTIABLE PAPER.** The judgment bonds of a county in the hands of innocent holders for value, without notice of their illegality for any cause, cannot be defeated by showing that the judgments were rendered upon warrants issued in excess of the constitutional limitation of five per cent, and that the board of supervisors fraudulently omitted to interpose the defense when the warrants were sued upon. BECK, J., *dissenting*.
2. **Taxation: ASSESSMENTS: RAILROADS.** A road tax against a railroad company is not defeated by the fact that the assessment of the property is not placed upon the assessment book of the township. The order of the board of supervisors, declaring the length of the main track and assessed value of the road lying within the township, transmitted to the trustees, becomes the basis for the levy of taxes upon railroad property.
3. **— : IRREGULARITIES.** Mere irregularities in the levy of the tax will not defeat its collection.

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4. —————: ROAD TAX. That the taxpayer has not been notified to work out that part of the road tax which might be paid in work will not authorize the restraining of the collection of the entire tax.

Appeal from Osceola Circuit Court.

TUESDAY, DECEMBER 12.

THE plaintiff's petition in substance alleges:

1. That plaintiff is a duly organized corporation.
2. That defendant is a duly organized political corporation.
3. That the Executive Council of the State of Iowa assessed plaintiff's property for the year 1873, the total valuation in Osceola county being \$44,750.
4. That at the regular meeting in September, 1873, the board of supervisors of Osceola county levied taxes upon the property of the county, including a tax of fifteen mills on the dollar for payment of principal and interest on judgment bonds.
5. That the county of Osceola was organized on the first of January, 1872, and the amount of taxable property for the year 1871 was \$82,881, and for 1872 was \$109,991.
6. That, previous to the issuing of any of the bonds for the payment of the interest of which the tax designated as the judgment bond tax was levied, the county of Osceola had become indebted in an amount exceeding five per cent of the value of the taxable property of the county.
7. That the bonds in question were issued to judgment creditors in payment of judgments against the county of Osceola, under the provisions of section 3275 of the Revision of 1860, as amended by chapter 87 of the Acts of the Fourteenth General Assembly of the State of Iowa; that the judgments were obtained against the county of Osceola upon warrants issued by the board of supervisors during the years 1872 and 1873, in excess of the five per cent limitation to which the county might become indebted, and in violation of the prohibition contained in Sec. 3, Art. 11, of the Constitution of Iowa.
8. That the board of supervisors of said county well knew

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that the said warrants were issued in excess of the sum that could be legally issued by the said county, and that the indebtedness for which they were issued was created in excess of the five per cent of the taxable property of the county, as shown by the State and county tax lists of the years previous thereto, and that the warrants were illegal and void; and the said board of supervisors fraudulently colluded with the holders of said warrants, and refused to appear in the courts where the judgments for which these bonds were issued were rendered and set up these defenses against the said warrants, and have the same fully litigated and fairly tried by the courts, and the property of this plaintiff and that of the other property owners in said county protected from the burden of a large public debt; that by reason of such corrupt and fraudulent neglect and collusion of the board of supervisors, a large and grievous debt is created against the said county for which this tax is levied; that the board of supervisors so colluded and conspired with the holders of said warrants and evidences of indebtedness, and refused and neglected to appear in the courts and set up such defenses to the warrants, and to protect the said county, for the purpose and with the intent of evading and setting at naught the constitutional prohibition contained in Sec. 3, Art. 11, of the Constitution.

9. That the tax levied by the board of supervisors was levied for the purpose of raising the money to pay the said bonds and interest thereon, and the treasurer of said county is about to take possession of the property of plaintiff and sell the same to pay the said bonds and interest.

Plaintiff, for further cause of action, alleges: That the auditor of the county of Osceola entered upon the tax lists of said county, for the year 1873, against the main track of plaintiff's road, the following sums of money for road tax of the several townships through which the road passes, to-wit: upon that portion of the road in the township of Holman, \$80.62; on that portion of the road lying in Gowry township, \$48.37 $\frac{1}{2}$; on the portion of the road in Wilson township, \$62.50. That the said tax was never levied against the property of plaintiff by the township trustees of the townships

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and was never carried out against the said property by the township clerks of said townships, and the township clerks did not make out any certified list of delinquent road taxes showing any taxes upon said railroad, and there were no taxes or charges of any road taxes upon said property of plaintiff returned by the clerk of any of said townships; and that plaintiff was never notified to do the work required for that portion of the road tax which could be so paid.

The petition asks that defendants be restrained from collecting the taxes, and that they be declared void and canceled. Upon the filing of the petition a temporary injunction was issued. The defendants answered as follows:

“1. Admit the facts stated in the first, second, third, and fourth paragraphs of the petition.

“2. They admit the county of Osceola was organized on the 1st day of January, 1872, but they deny the residue of the allegation in the fifth paragraph of the petition contained, and aver that there were no state or county tax lists of said Osceola county for the year 1871, and state said county was not in existence during any part of the year 1871.

“3. They admit that at the time of the issuing of the bonds referred to in paragraph six of the petition, the county of Osceola was indebted to some extent, but they deny that it was indebted to an amount exceeding \$4,500 when all of said bonds were issued, but was so indebted when some were issued, and they deny they were indebted in a sum exceeding five per cent of the taxable property of said county, as shown by the state and county tax lists, and they admit that in 1873 the county was indebted in the sum of six thousand dollars, but they aver that nearly all the warrants issued upon which judgments were rendered and said bonds were issued, were issued in payment of necessary and ordinary running expenses of said Osceola county, and in anticipation only of the ordinary revenue then accruing, and were not issued in violation of section 3, article 11, of the Constitution of Iowa, and for the purpose and intent of incurring an indebtedness within the meaning of said provision.

“4. They admit said bonds were issued to judgment credit-

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ors in payment of judgments against the county of Osceola, under the provisions of section 3275 of the Revision of 1860, as amended by subsequent acts of the General Assembly of the State of Iowa, and these defendants aver said bonds were negotiable in form and character, and as they are informed and believe, have passed into the hands of other parties who have purchased them in good faith and for value, without any notice of any claim that they are illegal for any cause.

“5. They deny allegations of neglect, conspiracies, fraud, collusion, corruption, illegalities, evil purposes and evasions charged in the eighth paragraph of the petition, except as to a very small part of the indebtedness.

“6. They admit the ninth allegation of the petition.

“7. And further, answering, they state that the plaintiff was during the years 1872 and 1873, and is, a corporation of Iowa, and for all civil purposes was, during said time, a citizen and resident of the county of Osceola, and a taxpayer therein; that said plaintiff did not object to the obtaining of said judgments, and the issuing of said bonds or any of them at the time the same were obtained and issued, nor until required to pay its share of the public taxation to meet the interest on said bonds; that said bonds were issued in due course of business in payment of judgments obtained upon due process in the courts, and the plaintiff, its agents and attorneys, well knew such proceedings at the time the same took place and made no objection to the same, and that said Osceola county recognizes said indebtedness represented by said bonds, and has no right or power to repudiate any portion thereof, and the same is valid.

“(II.) 1. For answer to the second cause of action set out in the petition, the defendants admit that the sums stated in said count were carried out, entered and charged upon the tax lists of said Osceola county, by the auditor thereof, as township road tax of the several townships stated in said count for the year 1873, but they deny that the said tax was never levied by the township trustees against the property of the plaintiff, and aver that, on the contrary, the trustees of each of said townships did levy a road tax upon the taxable prop-

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erty within said townships. They admit that the township clerks omitted to carry out the same against the property of the plaintiff as they ought to have done, and admit that the said clerks of said townships failed to show on their certified lists of delinquent road taxes any taxes for road purposes upon the property of plaintiff, as returned by said clerks; and they aver such omission was not intended to injure the plaintiff, and did not in the least prejudice plaintiff's rights. They admit the plaintiff was not notified to do the work.

"2. They deny said sums were illegally and without any authority of law entered against the said plaintiff's railroad, and were illegally included in the tax lists which the treasurer was and is authorized to collect, but aver the same was done by the auditor of said county legally and as authorized by law, and aver that the sums so entered were not in excess of the sum which the plaintiff would have been required to pay had the said township clerks carried out said taxes against the property of the plaintiff's said railroad and duly returned said taxes to said auditor as delinquent, and the plaintiff has not been injured by any irregularities arising out of the return or extension of said taxes, and the whole thereof is equitably and justly payable by the plaintiff.

"3. They admit the defendant, the treasurer, is about to collect the said taxes, and to levy upon and sell the property of the plaintiff to satisfy said taxes, and aver it was and is his intention to levy upon the personal property of the plaintiff for that purpose, unless paid without such proceedings, and they aver that the plaintiff has a full and adequate remedy at law if said taxes are illegal.

"4. They deny each and every allegation of the petition not heretofore admitted.

"5. They pray that defendants may have judgment dissolving the injunction issued in this action, that said taxes may be adjudged to be legal and valid and equitably due, and for costs."

This answer was duly verified. Upon the filing of this answer defendants moved to dissolve the injunction, upon the following grounds:

The S. C. & St. P. R. Co. v. The County of Osceola.

1. That the equities of the petition, if any, have been fully met by the allegations in the answer.
2. That the plaintiff, by the petition, fails to show any right or equity to the relief prayed.
3. That the petition shows facts which negative the relief prayed.
4. That the irregularities shown by the petition furnish no relief in equity.

The motion was sustained and the injunction was dissolved; plaintiff appeals.

J. H. Swan, for appellant.

R. J. Chase, for appellee.

DAY, J.—I. Appellants admit that the affirmative allegation of the answer that the bonds have passed into the hands of third parties, who purchased them in good faith for value without notice of any claim negotiable paper, that they are illegal for any cause, may be considered upon the question presented, except so far as the purchasers may be charged with notice by the records of the county and court.

Section 3275 of the Revision, as amended by chapter 174, Laws of 1872, provides: "In case no property of a municipal corporation, against which an execution has issued, is found upon which to levy, or if the judgment creditor elect not to issue execution against such corporation, he is entitled to demand and receive of such debtor corporation the amount of his judgment and costs, either in the ordinary evidences of indebtedness issued by such corporation, or in bonds of such corporation of such character as the parties may agree upon."

Pursuant to this provision the bonds in question were issued. The question now submitted for our determination is the following: Can the validity of negotiable bonds of a county, issued in satisfaction of a judgment, in the hands of innocent holders for value, without notice of any claim that they are illegal for any cause, be questioned by showing that

The S. C. & St. P. R. Co. v. The County of Osceola.

the judgments were rendered upon warrants issued in excess of the constitutional limitation of five per cent, and that the board of supervisors fraudulently omitted to interpose the defense when the warrants were sued upon? This question differs from all those which have hitherto been determined, involving the effect of section 3, article 11, of the State Constitution.

Upon mature consideration we are of opinion that bonds so issued cannot be assailed in the hands of innocent holders for value. There is a presumption that those charged with public trusts act honestly and in good faith. The whole theory of the law rests upon this assumption. In the absence of anything to put a party upon inquiry, he has a right to presume that everything has been fairly and honestly done. It is not incumbent upon him to institute an inquiry for the purpose of ascertaining whether some one may not have violated a trust or committed a fraud. It is the duty of the board of supervisors to appear and defend all suits instituted against their respective counties. Every principle of honesty requires, and every consideration of interest stimulates them to interpose all proper and available defenses. When a bond issued in discharge of a judgment is placed upon the market, a purchaser who has no intimation of anything affecting its validity has a right to presume that the board of supervisors have been mindful of their interest and their duty, and that all available defenses have been presented and passed upon. No one is called upon to presume or suspect that anything has occurred which is unusual, unnatural, and not in harmony with man's mental constitution. It is not usual, natural, nor in harmony with the laws of mind, that a board of supervisors, charged with the duty of protecting the interests of the county, should fraudulently conspire to saddle upon the county an unjust judgment, to the payment of which they must themselves contribute. No one, therefore, is required to presume that such a thing has occurred, or should be expected to deal upon the theory that the board have so acted. A vast majority of reasonably careful and prudent business men, when offered a negotiable bond issued in discharge of a judg-

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ment, would never think of inquiring whether the board of supervisors had not fraudulently neglected to set up a defense which should have been interposed. The law, to command respect and secure public confidence, must be just and reasonable. And to be just and reasonable it must be adapted to man's nature. A law is not so adapted which demands that a man for the protection of his interests shall do what a large majority of reasonably careful and prudent business men habitually omit to do.

If it be said that this construction nullifies the constitution and places it in the power of a dishonest and corrupt board of supervisors to burden the county with a debt in excess of the constitutional limitation, the answer is, that in the nature of things the instances in which a board of supervisors will undertake to do such a thing must be exceedingly rare. When such an instance occurs, and bonds issued upon a judgment so recovered have passed into the hands of innocent holders, loss must fall either upon such innocent holders or upon the county. It is more consonant with notions of right that the loss should be borne by the county, whose officials have acted corruptly and dishonestly, than upon the third party who has been innocent of all wrong.

Besides, it can rarely occur that a suit against a county can be instituted and prosecuted without coming to the knowledge of at least a considerable number of the citizens of the county. If the board of supervisors corruptly neglect or refuse to defend, a citizen taxpayer of the county may intervene and do so. *Greeley v. The County of Lyon*, 40 Iowa, 72. When no defense has been made, either by the board of supervisors, or a taxpayer, a third party, acting in good faith in the purchase of negotiable bonds issued to discharge the judgment, may presume that there was no valid defense to be interposed.

II. As to the road taxes it is claimed by appellant that no means are provided by which the assessment of railroad property is placed upon the assessment book of the township; that the assessment book of the township as returned by the township assessor is made the basis of the levy of the road tax, that the levy is made upon the

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roll as the assessor returns it, and not upon any other property or other amount, and hence cannot be made upon railroad property which never appears upon the assessor's book. If these positions be correct, the results will be startling in the extreme. They will operate to defeat not only road taxes, but all other taxes as well upon railroad property, for there is no provision in chapter 26, laws of 1872, under which this tax was levied, for placing the assessment of railroad property upon the assessor's books. This chapter provides that the census board shall assess railroad property, and transmit to the board of supervisors of each county through which the road runs a statement showing the assessed value per mile, and the length of main track of road in the county. It is the duty of the board of supervisors to make and enter in the proper record an order, declaring the length of the main track and assessed value of the road lying within each city, town, township and lesser taxing district in the county, and to transmit a copy of the order to the city council or trustees of each city or incorporated town or township. This order, so transmitted, becomes the basis for the levy of taxes upon railroad property.

III. The allegation of the petition that no tax was ever ~~a. —:irreg-~~ levied by the township trustees of the respective ~~ularities.~~ townships named is expressly denied in the answer.

The other allegations of the petition which are admitted constitute mere irregularities, and do not affect the validity of the tax. *The Iowa Railroad Land Company v. The County of Sac*, 39 Iowa, 124; *Same v. Carroll County*, Id., 151; *Cedar Rapids & Missouri R. R. Company, v. Carroll County*, 41 Iowa, 153.

The fact that plaintiff has not been notified to work out the part of the road tax which might be paid in work will ~~4. —:—:~~ not authorize the restraining of the collection of ~~road tax.~~ the entire tax. Perhaps upon a proper offer to work out the proportion of tax which may be paid in work, the collection of that part of it might be enjoined, and an opportunity to pay in work afforded. But this we need not determine, for no such offer has been made.

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Upon a careful examination of the pleadings in this case, we are of opinion that the court did not err in dissolving the injunction.

AFFIRMED.

BECK, J., *dissenting*.—I. Upon the point involving the validity of the taxes levied to pay the bonds, I am unable to concur in the conclusions of the foregoing opinion. In my judgment the constitutional prohibition against county indebtedness operates upon the *debt* attempted to be contracted whatever shape it may assume, or whatever evidence of its existence is created. It matters not whether the prohibited debt is evidenced by bond or judgment, it is utterly void—a nullity wherever, whenever, however it makes its appearance as a claim upon the county. The prohibition operates upon the creditor, the people of the county, the officers of the county, the county as a corporation, and upon all who become in any way interested in the matter; it operates, too, upon the courts and judgments rendered by the courts attempting to enforce the unconstitutional debts. These are all subordinate to the constitution.

When the supreme law of the State declares that the debt cannot be contracted, it means that it cannot exist. This law cannot be defeated by the people of the county, willing to contract the debt, by county officers consenting to a judgment, by judgment of a court, nor by any means to which violators of the constitution and law may resort.

It surely is inconsistent with the dignity and power of the State to hold that the people, county officers and courts of the State, may defeat the express provision of the supreme law—may render valid and enforce a debt which the constitution declares cannot be contracted and shall not exist.

The whole world must take notice of the provisions of the constitution. No one can claim to be a *bona fide* holder without notice of a bond issued for a debt forbidden by that instrument. No holder of such a bond can have any equity that will defeat the constitution.

These views and the conclusion I reach, in my opinion, are

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supported by our decisions in *McPherson et al. v. Foster Bros. et al.*, 43 Iowa, 48; and *Mosher v. Ind. School Dist. of Ackley*, 44 Iowa, 122.

II. I assent to the conclusions of the opinion of the majority of the court upon the questions involving the validity of the road taxes, and concur in the opinion to that extent, but no farther.

MURPHY, NEAL & CO. ET AL. V. CREIGHTON.

1. **Jurisdiction: ADMINISTRATOR: JUDGMENT.** The probate court has jurisdiction to appoint an administrator, even in a county where there is no property of deceased beyond an interest in an action at law, and its adjudication is not open to collateral attack.
2. **Practice: PLEADING.** Where a petition is not assailed by motion, demurter, or in arrest, an objection which might have been made in either of those methods, but was not, will be deemed to have been waived.
3. **Payment: WHEN MADE VOLUNTARILY: RECOVERY.** If a party with full knowledge of all the facts in the case voluntarily pays money in satisfaction or discharge of a demand unjustly made upon him, he cannot afterward allege such payment to have been made by compulsion and recover back the money.
4. **Contract: AFFREIGHTMENT.** A contract between a shipper and a transportation company stipulated that the latter would ship the goods of the former to two points named at the lowest rates; it appeared that to one of the points specified the company had carried the goods of another party at lower rates than those of the party to the contract: *Held*, that this entitled him to recover back from the company the difference only upon the goods shipped to that particular point, and not upon those carried to both the destinations mentioned in the contract.

Appeal from Pottawattamie District Court.

TUESDAY, DECEMBER 12.

A written contract is attached to the petition as an exhibit. It is in these words:

“MESSRS. MURPHY, NEAL & CO., Helena. }
MURPHY, HIGGINS & CO., Deer Lodge. }

“*Gents:* We will transport and deliver all merchandise shipped by you to Montana, at the following rates from St.

45	179
81	366
45	179
93	600
45	179
107	387
45	179
121	247
121	345
122	184
45	179
124	38

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Louis: (6) six cents per pound to Helena and Deer Lodge. You hereby agree to ship all freight controlled by you during the season by railroad. For all shipments from other points, deduct 45c. per 100 pounds from through rate and add amounts paid by us to the various roads from shipping point to Omaha, thus making through rate. All goods to be shipped on or before Sept. 15, 1871. It is further agreed, if we carry any freight at lower figures than six cents, your rates will be same as the lowest to points named. Yours truly,

JAS. F. AGLER, *Gen'l Manager.*

"Accepted:

MURPHY, NEAL & Co.

MURPHY, HIGGINS & Co."

It is alleged in the petition that the contract was made with plaintiffs by the Far West Freight Company, a partnership of which Edward Creighton was a member, and that said company, under said contract, transported and delivered to plaintiffs, at Helena and Deer Lodge, 921,979 pounds of merchandise, for which plaintiffs paid said company at the rate of six cents per pound, as they supposed they were liable to do under the terms of said contract; that about April 14, 1871, said Far West Freight Company entered into an agreement with one A. G. Lowry to transport to him at Helena, Montana territory, one hundred and fifty tons of merchandise at five dollars and seventy-five cents per hundred pounds, and that said company did so transport said merchandise, which was a lower rate than said company had given plaintiffs. It is claimed that plaintiffs, by the terms of the last clause of their contract, are entitled to recover the difference between six cents per pound, the rate paid said company, and five and three-fourths cents per pound.

There was personal service upon Edward Creighton and he appeared, and on the 22d day of August, 1874, filed his answer denying each and every allegation of the petition. On the 8th day of November, 1874, Edward Creighton died, and on the 10th day of the same month John A. Creighton, appellant, was appointed special or temporary administrator of his estate

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by the probate court of Douglas county, Nebraska. On the 16th day of December, 1874, John A. Creighton applied to the Circuit Court of Pottawattamie county, Iowa, for letters of administration, setting forth in his petition that said deceased in his lifetime was defendant in a suit pending in said county, wherein Murphy, Neal & Co. *et al.*, were plaintiffs, and asking that letters of administration be granted to him, to the end that said suit might be brought to a speedy trial and final settlement. This petition also set forth the appointment of petitioner as administrator in the State of Nebraska. On the same day the said Circuit Court appointed said John A. Creighton administrator, in accordance with the prayer of the petition.

On the 20th day of March, 1875, letters of full administration were issued to him by the probate court of Douglas county, Nebraska. On the 26th day of April, 1875, he was substituted as defendant in this cause, and appeared, and the cause was continued by consent.

In November, 1875, appellant filed an amendment to the answer, alleging that at and before the date of his death Edward Creighton was a resident of Nebraska, and that at the date of his death, which occurred in Nebraska, he was not the owner of any property, real or personal, of any kind or description, within the State of Iowa, nor had he any estate of any kind within this State to be administered, and that because of these facts the letters of administration issued by the Circuit Court of Pottawattamie county were void for want of power and jurisdiction in said court to issue the same. The petition and record of the Circuit Court, in the matter of the appointment of the administrator, are exhibited with the answer as part thereof.

To this amendment to the answer there was a demurrer, which was sustained. A jury was waived and there was trial by the court, judgment for plaintiff, and defendant appeals.

Clinton, Hart & Brewer, for appellant.

Sapp & Lyman, M. Key and Doniphon & Reed, for appellees.

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ROTHROCK, J.—I. There are a number of causes set out in the demurrer to the amended answer, but we think it must be determined on the question of jurisdiction, and to that clause alone we will direct our attention.

The Code, section 2312, provides that: “The Circuit Court of each county shall have original and exclusive jurisdiction of the probate of wills, and the appointment of such executors, administrators, or trustees, as may be required to carry the same into effect, *of the settlement of the estates of deceased persons*, and of the persons and estates of minors” * * *

It is argued that in order to confer jurisdiction upon the court there must be property, or an estate, in the county where administration is granted. This may be conceded, and still we think there was jurisdiction to grant the letters in question. The Code nowhere provides the steps to be pursued to obtain letters of administration, as by petition or otherwise; neither is there any provision as to what evidence shall be adduced to prove that there is property or an estate within the county. What evidence there was before the court in this case on that question we are left to conjecture. Property does not necessarily consist of things tangible. It may have been shown to the court that the interests of this estate demanded that affirmative relief be asked in the action. There was an affirmative claim at least for costs. It is not sufficient that it be shown that the evidence of the existence of an estate in the county did not justify the court in finding that there was an estate. The court had jurisdiction of the subject matter and its adjudication cannot be collaterally attacked.

II. The cause of action, set out in the petition, is to recover back money paid through mistake. The allegation of the petition setting forth the mistake is in these words: “Plaintiffs paid said company at the rate of six cents per pound, as they supposed they were liable to do under the terms of their said contract.”

It is insisted that no recovery can be had upon the allegations of this petition. It is proper to observe that the petition does not charge a fraudulent concealment of the contract

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with Lowry. If, then, the plaintiffs can recover at all, it must be by reason of paying the excess under a mistake.

No objection was taken to the petition by motion, demurrer, or in arrest of judgment, and we must hold that such objection was waived. Code, Secs. 2648, 2650.

III. It is claimed that the evidence does not show that the money claimed was paid in mistake of fact. The defect ^{3. PAYMENT:} in the petition in not setting out when the payment was made, and that at the time of payment recovery. plaintiffs did not know of the contract with Lowry, although waived, does not dispense with proof sufficient to sustain the cause of action founded upon mistake. Counsel for appellee concede the rule to be correct as stated in *Patterson et al v. Cox*, 25 Ind., 261, in a quotation from the opinion in *B. & S. Glass Co. v. City of Boston*, 4 Metcalf, 181, as follows:

"If a party, with full knowledge of all the facts in the case, voluntarily pays money in satisfaction or discharge of a demand unjustly made upon him, he cannot afterward allege such payment to have been made by compulsion and recover back the money * *. In such case, if the party would resist the unjust demand, he must do so upon the threshold. The parties treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment."

A careful examination of the evidence in this case discloses an utter failure on the plaintiffs' part to show that the payment in question was made under any mistake whatever. The allegations of the petition are denied, and the burden was on the plaintiffs to prove not only the contract with Lowry, but that when they paid for their shipments they did so without any knowledge of the Lowry contract.

It is claimed that the circumstances attending the shipment of Lowry's goods and other circumstances in the case show that plaintiffs were ignorant of the terms of Lowry's contract. We cannot so regard them. The alleged mistake was a fact to be proved. All these circumstances might well be true, and still the plaintiffs may have known of the Lowry

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contract before they paid the money which they now claim to recover.

IV. It was established on the trial, beyond question, that the Far West Freight Company did ship to Helena, for A. G.

^{4. CONTRACT:} Lowry, a large quantity of merchandise for \$5.75 affreightment per hundred. By the contract with plaintiffs their rates to Helena and Deer Lodge were to be six dollars per hundred, and the contract contains this provision:

"It is further agreed that, if we carry any freight at lower figures than six cents, your rates will be the same as the lowest to the points named."

Plaintiffs had merchandise shipped to both Helena and Deer Lodge, and there is no evidence that any shipments were made by the Far West Company to Deer Lodge at any rate less than six cents per pound. Under these circumstances we think that no recovery can be had for over-payment on the shipments to Deer Lodge. The fair construction of the contract is that plaintiffs' rates to Helena were to be as low as the lowest to that point, and that their rates to Deer Lodge were to be as low as the lowest to that point. The language is, "your rates will be the same as the lowest to points named." But Lowry did not ship to "points named," that is to Helena and Deer Lodge; he only shipped to one of the "points named." The meaning is that plaintiffs' rates should be the same as the lowest to Deer Lodge, and the same as the lowest to Helena. As it does not appear that any shipment was made to Deer Lodge for less than six cents per pound, plaintiffs cannot claim that their shipments to that point should be less than the contract price.

We see no other error in the record before us. The cause will be reversed and remanded for a new trial.

REVERSED.

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**THE CITY OF MUSCATINE v. THE KEOKUK NORTHERN LINE
PACKET COMPANY.**

35	185
78	264
45	185
121	347
123	184

**THE NORTHWESTERN UNION PACKET COMPANY v. THE CITY
OF MUSCATINE.**

45	185
126	684

1. **Municipal Corporations:** WHARFAGE: REASONABLE COMPENSATION. Under the charter of a city providing that the city "shall have control of the landings of the Mississippi river, and the right to build wharves and regulate the landing, wharfage and dockage of boats," it may establish and construct wharves and collect a reasonable compensation for their use.
2. — : — : MUST BE FIXED BY ORDINANCE. The erection of a wharf by a city must be presumed to be for the use and benefit of the public, and in the absence of any ordinance fixing the wharfage dues or providing for the payment of a compensation for the use of its wharves, such compensation cannot be collected by the city.
3. — : — : VOLUNTARY PAYMENT. Where the owners of boats have paid wharfage fees under protest, which were demanded and collected in the absence of authority to make the demand, they cannot recover them back in an action against the city.
4. — : — : — . The mere danger that an action at law will be commenced to enforce payment, does not make the payment of a demand unjustly and illegally made a compulsory payment.

Appeal from Muscatine Circuit Court.

WEDNESDAY, DECEMBER 13.

THESE two causes are submitted on the same abstract and argument.

In the second action the plaintiff seeks to recover of the defendant certain wharfage dues paid under protest, and the issues in this action are like those presented in the other, except such as grow out of the right to recover back the money so paid.

The petition in the first action contains two counts—the first stating that the City of Muscatine was incorporated by an act of the legislature of Iowa, which, among other things, declared that the City of Muscatine "should have control of the land-

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ing of the Mississippi river, to build wharves, and regulate the landing, wharfage and dockage of boats."

That the city council passed ordinances, which are now in force, as follows: "That the landing on the shore of the Mississippi river from the foot of Iowa avenue to the foot of Pine street, including the width of those streets, is declared to be a steamboat wharf, and shall be kept clear of all obstructions except articles unloaded from or to be shipped upon steam-boats, barges, keel boats, and lighters. * * * *

"Sec. 4. A wharfage of five dollars shall be charged for and be paid by each steamboat landing at the levee, or at any other point in the city limits, on its upward trip, and any boat not having landed on its upward trip, shall pay the same sum if they land on the downward trip.

"Sec. 5. The wharfage to be paid to the wharfmaster."

That the city graded, built, and now maintains, a wharf or levee on the shore of the river between the streets designated in the ordinance. That defendant was the owner of certain steamboats—naming them—which defendant used in the business of commerce on said river; that defendant, on the days named in the petition, commencing July 1, 1875, landed said boats at the wharf of the city on the upward trip of said boats; at which times the wharfmaster of said city demanded the sum of five dollars each for the use of said wharf by said boats, which was a reasonable compensation, which defendant refused to pay.

The second count avers that in 1858 the city built and erected a wharf, as designated in said ordinance, at an expense of more than ten thousand dollars; that the city is the owner of said wharf; has expended thereon more than one hundred dollars each year for repairs; that said wharf was built by the city for the use and benefit of steamboats landing at said city; that defendant, knowing the city had erected and maintained said wharf for said purpose, and knowing that said city made a charge of five dollars for every steamboat landing at and using said wharf, on the upward trip, on the days named, commencing July 1, 1875, landed the boats designated, on their upward trip, and at such times used said wharf for said

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boats to receive and discharge freight and passengers, and then and there promised to pay said sums, which were a reasonable compensation for the use of said wharf by said boats, and which said several sums defendant has refused and still refuses to pay, etc.

To said petition the defendant filed a demurrer to so much of the petition as sets out section 4 of the ordinance, on the following grounds: "That the facts stated in the petition, so far as relates to said section, do not entitle the plaintiff to the relief demanded in this:

"1. Because section 4 of the ordinance set forth in plaintiff's petition is in conflict with article 1, section 8, paragraph 3, of the Constitution of the United States, which reads as follows:

"* * * * Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes.'

"2. Because section 4 of the ordinance set forth in plaintiff's petition is in conflict with article 1, section 9, paragraph 5 of the Constitution of the United States, which reads as follows:

"No tax or duty shall be laid on articles exported from any state; no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another.'

"3. Because section 4 of the ordinance set forth in plaintiff's petition is in conflict with article 1, section 10, paragraphs 1 and 2 of the Constitution of the United States, which read as follows:

"No state shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws. * * * No state shall, without the consent of Congress, lay any duty of tonnage * * *."

There were other grounds of demurrer which it is deemed unnecessary to notice. The demurrer was sustained because

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the fourth section of the ordinance was in "conflict with the Constitution, laws and ordinances of the United States."

The answer denied that the city had erected or maintained any wharf, and averred that the portion set apart for a steam-boat landing was not kept clear of obstructions. That the city had leased the same to private parties, who had assigned the leases to the defendant, who had at its own expense constructed the wharf at which defendant's boats had landed; that the plaintiff provided no snubbing posts, bolts, rings or other conveniences for the landing of boats, and that plaintiff was at no expense in repairing said wharf.

There was a trial to the court, a finding for the city in both actions, and judgment, from which the defendant appeals.

James H. Davidson and D. C. Cloud, for appellant.

Hanna, Fitzgerald & Hughes, for appellee.

SEEVERS, CH. J.—I. As the city has not appealed from the ruling of the court sustaining the demurrer, the question thereby presented is not before us. For the purposes of this case, the decision of the Circuit Court in that respect must be deemed correct.

The Circuit Court must have found that the city had established and constructed a wharf, at which defendant's boats landed, and therefrom, as a conclusion of law, found there was an implied promise to pay a reasonable compensation for the use of the wharf.

There was evidence to justify such finding, and we cannot, under the well established practice of this court, set aside the finding of facts as being against the weight of evidence. But there was no evidence tending to show that defendant promised or agreed to pay any wharfage dues, and the finding of the court must have been based solely on an implied promise resulting from the use of the wharf.

Previous to incurring the liability as claimed by the city,

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for which this suit is brought, the defendant paid certain ^{1. MUNICIPAL} wharfage dues, under protest. Such payments, corporations: however, were made under section four of the wharfage: reasonable compensation. At no time can it be said the defendant recognized the right of the city to collect a reasonable compensation for the use of the wharf.

The question for determination is, whether, under the charter, ordinance, and facts above stated, the city can recover such compensation.

The charter provides that the city "shall have control of the landing of the Mississippi river, to build wharves and regulate the landing, wharfage and dockage of boats and water crafts, * * * to establish the grade of streets, alleys and wharves, and to change that of wharves at pleasure."

There can be no doubt the city possessed the power to establish and construct a wharf and regulate the landing and wharfage of boats thereat.

II. The next question is, what has the city done under the granted power? The abstract states that the city introduced in evidence the charter and ordinance copied in the petition. Turning thereto, we find the ordinance provides that a certain portion of the landing on the shore of the Mississippi river should be a steamboat wharf, and kept clear of obstruction, except articles unloaded from or to be shipped upon steam-boats and barges, keel-boats and lighters. Then follows section four, which has been declared void; and section five provides, "such wharfage is to be paid to the wharf-master of said city," that is to say, the wharfage dues, established by section four of the ordinance, are to be paid to the wharf-master.

Inasmuch as section four of the ordinance is void, the city has not in any manner or form exercised the power given by the charter to "regulate the landing, wharfage and dockage of boats," except to declare a certain portion of its frontage to be a steamboat wharf.

In the absence of any ordinance fixing the wharfage dues, or providing for the payment of a compensation for the use ^{2. —: —;} of the wharf, under the power given in the charter, we are of the opinion such dues cannot be ^{must be fixed by ordinance.}

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claimed or collected by the city. Until the city claims the right and assumes the responsibilities under the power given in the charter to regulate, not only the landing, but the wharfage and dockage of boats, no rights can be acquired thereunder.

These public municipal corporations have the power to construct wharves on the Mississippi river, and it may be conceded, when they have done so, they may charge and collect a reasonable compensation for the use of such wharves; but, if such is their design and intent, they must in some manner indicate it, so that the owners of vessels landing there may so know and act accordingly.

The erection of a wharf by a city is and must be presumed to have been made for the use and benefit of the public, like the paving of a street or other improvement, unless the contrary is shown. Such use to be free, unless an intent to charge therefor is provided by ordinance, or possibly in some other manner, so as to clearly indicate such intent.

These municipalities have different relations from those of individual riparian proprietors. In case the latter should erect a wharf, the presumption might be that he intended to charge for its use. He has no public duties to perform, and acts solely in an individual capacity. Not so as to these public corporations. As to them, the general rule is, they act in a public capacity and for a public purpose.

It is not shown that the city ever demanded any compensation *for the use of the wharf*, either by the wharf-master or other person, or that the defendant ever paid anything for such use. Whatever was demanded on one side and conceded by the other was done under section four of the ordinance, and because it provided for the payment of wharfage, and the most the city can claim is that the ordinance was regarded as legal and valid as a law. Such section of the ordinance having been declared void from the beginning, whatever was done thereunder amounts to nothing and in no way affects the rights of the parties in this action.

III. In the second action the defendant seeks to recover

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of the city wharfage dues paid the city, and which we have
3. — : just determined to be illegal. Whether such a
^{voluntary} payment recovery can be had depends on the question
whether the payments are to be regarded as voluntary or
compulsory in a legal sense.

It is stated in the abstract that the city concedes the said
payments were made under protest. The fair construction of
this concession is, that the defendant at the time each pay-
ment was made protested or objected to the right of the city
to collect wharfage dues.

We have looked in vain for any provision in the ordinances
or general laws of the State authorizing a seizure of the boat,
or proceeding in attachment, or in fact anything defining
how or in what manner the payment of the wharfage dues
could be enforced. In the absence of any such provision we
think it is clear the collection of such dues could only be en-
forced in an ordinary action at law. Nor do counsel for the
defendant claim otherwise, or that the payments were made
under a mistake of fact. The rule on this subject is well
stated as follows: "If a party, with full knowledge of all
the facts of the case, voluntarily pays money in satisfaction or
discharge of a demand unjustly made on him he cannot after-
wards allege such payment to have been made by compulsion
and recover back the money, even though he should *protest*
at the time of such payment that he was not legally bound
to pay the same. The reason of the rule, and its propriety,
are quite obvious, when applied to a case of payment upon a
mere demand of money unaccompanied with any power or
authority to enforce such demand except by a suit at law."
Boston and Sandwich Glass Co. v. City of Boston, 4 Met.,
181. In that case the payment was regarded as compulsory
because of the power vested in the collector of taxes to levy
directly on the property of the party making the payment.
To the same effect is *Wabaunsee Co. v. Walker*, 8 Kansas,
431, and authorities there cited. In fact our attention has
not been called to any case where it has been held such a pay-
ment is compulsory, unless the officer or person to whom it
was made was vested with the power to seize property and

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thus enforce payment. Such was the case in *Preston v. Boston*, 12 Pick., 7; State Tonnage Tax Cases, 12 Wall., 204, and other cases cited by counsel. It is true that in the State Tonnage Case the judge delivering the opinion does not refer to such fact as having any bearing on the question. Nevertheless, it is shown that such power existed.

In the *Packet Co. v. St. Paul*, 3 Dillon, 454, it does not appear whether or not the power existed to distrain for the wharfage dues, and the opinion is based solely on what is said by CLIFFORD, J., in The State Tonnage Tax Case. The *R. R. Co. v. Pattison*, 41 Ind., 312, and *Harmony v. Bingham*, 12 N. Y., 99 (116), are not in point. They involve a different principle and the facts are totally different.

We are of the opinion that the mere danger of a multiplicity of suits is not sufficient to make these payments compulsory. No adjudicated case has been cited in favor of such proposition. Under the facts appearing in the record before us, we are of opinion the payments were voluntary and not compulsory. The judgment of the Circuit Court in the first action must be reversed, and in the second

AFFIRMED.

45 192
108 576

THORPE BROTHERS v. DURBON ET AL.

1. **Lien**: CHANGE OF. In exchanging one form of security for another for the same debt, no other lien can intervene and become paramount thereto.
2. ——: MORTGAGE: MECHANIC'S LIEN. Where the vendee of real estate under a verbal agreement of purchase erected thereon a building to which a mechanic's lien attached, and subsequently thereto he received a deed and executed a mortgage for the purchase money, *held* that the lien of the mortgage was paramount to the mechanic's lien.

Appeal from Delaware Circuit Court.

WEDNESDAY, DECEMBER 13.

ACTION to foreclose a mortgage upon premises owned by the defendant, Durbon. The defendants, N. J. Wolcott & Co.

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and C. R. Davis, hold mechanic's liens on the premises. Prior to the time of the commencement of the work and the furnishing of the materials for which the mechanic's liens are claimed, July, 1874, the premises were owned by the plaintiffs. During that month a verbal agreement was entered into between plaintiffs and defendant, Durbon, whereby they sold to him the premises in question for the sum of \$3,500. No part of that sum was paid, however. The plaintiffs retained the legal title until August 16, 1874, when they conveyed the premises to said Durbon and took a mortgage from him to secure the purchase money. The deed to Durbon and mortgage from him to plaintiffs were filed immediately for record.

Between the time of the said verbal agreement and the time of the execution of the deed and mortgage the said mechanics, by virtue of a contract with Durbon, performed labor and furnished materials in the erection of a building upon the premises, and they claim that their lien therefor is paramount to the plaintiffs' mortgage. The Circuit Court decreed that the mortgage was paramount.

The holders of the mechanic's liens appeal.

Bronson & Leroy and E. M. Carr, for appellants.

S. G. Van Anda, for appellees.

ADAMS, J.—I. One of the questions discussed by counsel is as to whether Durbon was the owner of the premises prior to the time of the conveyance to him, August 16,
^{1. LIEN:}
_{change of.} 1874. It is claimed by the plaintiffs, the mortgagees, that he was not, and that whatever labor and materials were furnished for Durbon by the mechanics for the erection of a building on the premises prior to that time were not furnished by virtue of a contract with the owner of the premises, and that they did not, therefore, acquire any lien prior to that time.

In our opinion, however, the plaintiffs might concede that Durbon became the equitable owner of the premises before any materials were furnished or work done. Until the execution of the deed and mortgage the plaintiffs held the legal

Davis v. Payne and Shadduck.

title for their security, and afterwards they held the mortgage. In changing one form of security for another for the same debt no other lien could intervene and become paramount thereto. *Parsons v. Hoyt*, 24 Iowa, 154; *Packard v. Kingman*, 11 Iowa, 219.

II. The building erected by the mechanics adjoins another building previously erected on the premises. Whether 2. ____: mort- it is built into and so incorporated with the other gage: me- chanic's lien. as that it cannot be removed under the decision of *Getchell v. Allen*, 34 Iowa, 559, is a question which we should regard as by no means free from difficulty if the case were triable here *de novo*; but it is not so triable. It does not appear that the evidence was reduced to writing, and the case is presented on assignment of errors. The evidence is conflicting, and the decision of the court below that the building cannot be removed must be regarded as correct.

AFFIRMED.

DAVIS v. PAYNE AND SHADDUCK.

1. **Pleading: REPLY.** A reply is unnecessary where the answer does not set up a counter-claim and the plaintiff has no matter to plead in avoidance of the allegations of the answer.
2. **Surety: PROMISSORY NOTE: EVIDENCE.** In an action upon a promissory note against a surety, the failure to object to the introduction of oral evidence showing that the surety requested the payee to sue upon the note, will not be deemed a waiver of the statutory requirement that such request should be in writing.

Appeal from Clinton District Court.

WEDNESDAY, DECEMBER 13.

ACTION upon a promissory note against the defendants as joint makers. Default was entered against the defendant, Payne, for want of a defense. Shadduck answered, setting up in substance that he was surety, and that there was an extension of time given by Davis to Payne, upon some consideration, without the knowledge of the surety, and thereby Shadduck

Davis v. Payne and Shadduck.

was discharged; and that at or before the maturity of the note, Shadduck, as surety, requested Davis to sue said Payne on said note and to collect the money due thereon, and that said Davis refused to enforce collection, whereupon Shadduck informed Davis that he would not be held as surety longer, unless Davis would proceed to enforce collection against Payne. A jury was waived, and there was trial to the court. Judgment for plaintiff and defendant, Shadduck, appeals.

Corning & Grohe, for appellant.

Ellis & Spence, for appellee.

ROTHROCK, J.—I. We have carefully examined the evidence relied upon by appellant to show that there was an extension of time given for a consideration, without his knowledge or consent, and are of opinion that the court below correctly found for the plaintiff on that issue. There is a conflict in the evidence with, as we think, a preponderance against appellant. There being such conflict we could not disturb the finding of the court below under the rule so often announced here, even conceding the preponderance to be in appellant's favor.

II. It is insisted by counsel for appellant that as there was no reply to the answer, the allegations thereof should be held as admitted. A reply was neither necessary nor allowable. There was no counter-claim; and plaintiff did not claim to have a defense to any matter alleged in the answer by reason of the existence of some fact which avoided the matter alleged in the answer. The allegations of the answer not relating to a counter-claim are to be deemed controverted without a reply. Code, Secs. 2665, 2712.

III. The alleged request to enforce collection of the note was not in writing. It is claimed, as there was no objection interposed to the oral evidence showing such request, that objection was thereby waived. This cannot be admitted. The Code, Sec. 2108, provides that such request shall be in writing. The fact to be established was that a request in writing had been given. The

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defendant's evidence only shows that he had not complied with the statute by making the request in writing. The fact that plaintiff made no objection to the evidence is a waiver of nothing in regard to the thing defendant was required to prove, that is, a request in writing.

AFFIRMED.

45 108
88 680

THE CITY OF KEOKUK v. THE KEOKUK NORTHERN LINE
PACKET CO.

THE CITY OF FORT MADISON v. THE SAME.

THE CITY OF BURLINGTON v. THE SAME.

1. **Municipal Corporations: WHARF: WHAT CONSTITUTES.** Upon a non-tidal stream, any construction of timber or stone upon the bank, of such shape that a vessel may lie alongside of it with its broadside to the shore, constitutes a wharf, and a paved street extending to the water's edge and used by vessels as a place for receiving and discharging freight and passengers may be so designated.
2. _____: _____. **WHARFAGE FEES.** A city may prescribe by ordinance the fees which shall be paid for the use of the wharves within its limits, and this power is subject only to the limitation that such fees shall be reasonable.
3. _____: _____. Wharfage fees thus levied do not constitute a tax, but are to be regarded simply as compensation exacted for the use of the wharves.
4. _____: _____. In the exercise of their police powers cities may control the landing of boats, designating the places at which they shall receive and discharge freight and passengers, and collecting a reasonable compensation for wharfage. *SEEVERS, CH. J., dissenting.*
5. _____. **WHARFAGE FEES: CONSTITUTIONAL LAW.** An ordinance requiring the payment of wharfage fees is not unconstitutional, even though it exacts payment from vessels when they are moored at places where no wharves have been provided.

Argument 1. The city may control the landing of vessels and fix the places where they may receive and discharge freight and passengers.

Argument 2. Even conceding that part of the ordinance to be unconstitutional which authorizes the collection of wharfage fees from vessels that do not land at wharves, the remainder of the ordinance would not for that reason be void. *SEEVERS, CH. J., dissenting.*

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6. — : — : TONNAGE DUTY. The fact that the wharfage fee is graduated by the tonnage of the vessel does not constitute a duty on tonnage, within the meaning of the Constitution of the United States forbidding the levying of such an impost.

Appeal from Lee and Des Moines District Courts.

WEDNESDAY, DECEMBER 13.

THESE are actions by the respective plaintiffs to recover charges for wharfage claimed to be due each under ordinances of the several cities providing therefor. The several petitions allege that defendant is indebted to the respective plaintiffs by reason of its boats landing at and using the wharves of each. The pleadings in each case being different, their substance must be separately set out. In the first case the petition alleges that the city of Keokuk is empowered by its charter to establish and regulate wharves and to fix the rates of wharfage for all boats landing or moored at such wharves; that at great expense it erected wharves upon the river within its limits and expended large sums in making additions thereto and keeping them in repair; that in order to raise money for such outlays, the city issued wharf bonds, which were negotiated, and to meet the interest and principal thereof, the city, by ordinance, fixed a wharfage fee to be paid by each boat or vessel using the wharves; that the boats of defendant landed at the wharves so constructed and improved by the city and there received and discharged freight and passengers. The petition seeks to recover wharfage under the city ordinance to the amount of the fees prescribed therein. The other pleadings in the case are set out in the abstract, upon which the case is submitted, in the following language:

“ Defendants answered, admitting the city of Keokuk was a municipal corporation under a special charter; that defendant was a corporation organized under the laws of Missouri, and was engaged in navigating the Mississippi river with steamboats. They admit defendants landed their boats at Keokuk; admit that the wharfage was charged under the city ordinances of Keokuk; admit defendants have refused to pay such wharfage, and they set up and make part of their answer

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sections 1, 2, 3 and 4 of the city ordinances relating to the collection of wharfage by the city, as follows:

“Be it ordained by the City Council of the City of Keokuk:

“**SECTION 1.** That all the ground now lying or which shall be made hereafter, between Water street, in said city of Keokuk, and the middle of the main channel of the Mississippi river, throughout the entire length of said city, is hereby declared a wharf and subject to be used for such purposes, and under such terms as are or may be prescribed by ordinance.

“**SEC. 2.** That the whole of Water street, as well as the land described in the foregoing section, is hereby declared open for the use and purposes of a wharf, and subject to all the rules and regulations prescribed by ordinance for the government and regulation of the wharves of the city of Keokuk, and all boats, rafts and water craft of every description whatever, that are moored to or landed at any part of Water street, and the persons owning, claiming and having charge of the same, shall be subject to the same rules, regulations, wharfage and penalties as are provided by this ordinance in relation to boats, rafts and other water craft landing or mooring at the wharf as defined by the third section of this ordinance: *Provided*, Nothing contained in this section shall be construed to interfere with the use of Water street as a public street.

“**SEC. 3.** That any steamboat which shall make fast to any part of said wharf or Water street, or to any vessel or other thing at or upon said wharf or street, or shall receive or discharge any passengers or freight thereon, or shall use any of said wharf or street for the purpose of discharging, receiving or landing any freight or passenger, shall, if the tonnage of said boat be less than fifty tons, be liable to a wharfage fee of one dollar; if the tonnage of said boat be less than one hundred tons and more than fifty tons, the same shall be liable to a wharfage fee of one dollar and fifty cents; all boats of one hundred tons and less than two hundred tons shall be liable to a wharfage fee of two dollars; all boats of two hundred tons and less than three hundred tons, shall pay a wharfage fee of three dollars; all boats of three hundred tons and less

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than four hundred tons shall pay a wharfage fee of four dollars; and all boats of four hundred tons and upwards, the sum of five dollars; and all boats that shall remain at said wharf or street over two and less than five days, shall pay a wharfage fee of one dollar and fifty cents for each day after the first two days; and should said boat remain at said wharf or street over five days, said boat shall be liable to a wharfage fee of one dollar per day for every day it may remain at said wharf or street over five days. *Provided*, That the city council may fix by resolution the sum to be paid as wharfage by boats plying regularly between the city of Warsaw, Alexandria or Nanvoo—said wharfage fees to be paid by the owner, captain, clerk, mate or agents of said boats to the wharf-master or his deputy: *provided, further*, that boats engaged only in towing rafts, and only land at the wharf for the purchase of fuel or stores for its own use, shall be exempt from wharfage.

“SEC. 4. That all crafts usually known and denominated barges, canal boats or keel boats, used in the carrying trade, whether in tow or otherwise, landing at the wharf of the city, shall be charged wharfage in accordance with their tonnage or carrying capacity, the same rates as are charged steam-boats.”

“Defendants, for further answer, show that the boats named in the petition were each of more than twenty tons burden; were engaged in navigating the Mississippi river from St. Louis, Missouri, to St. Paul, Minnesota; engaged in commerce between the States of Minnesota, Iowa, Wisconsin, Illinois and Missouri, and landed at Keokuk, one of its regular ports; and while so employed, and during the time set out in the petition, were duly licensed and enrolled for the coasting trade under the acts of Congress for the regulation of commerce. That the ordinance under which plaintiff claims wharfage was and is illegal and void and in violation of the Constitution and laws of the United States, and such wharfage tax is illegal and plaintiff has no right to recover same from defendant.

“To this answer plaintiff demurred, because section 3 of the ordinance 59, under which plaintiff claims, is not illegal

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and does not conflict with the provisions of the Constitution of the United States or the laws of Congress."

The demurrer was sustained by the court, and the defendant standing on its answer, judgment was rendered for plaintiff.

2. In the second case the petition in proper form claims to recover wharfage under an ordinance therein pleaded, containing the following provisions:

"1. Be it ordained by the city council of Ft. Madison, that all the ground lying along the Mississippi river within the corporate limits of the city of Ft. Madison, and known as public ground, is declared to be a wharf or landing, subject to be used for such purposes only under such regulations, and upon such terms as are hereinafter prescribed.

"2. Any steamboat which shall land or make fast at any part of the wharf or landing, or to any vessel or other thing, at or upon the wharf or landing, or shall receive or discharge any passenger or freight thereat, shall be liable and shall pay to the city wharfmaster a fee of one dollar for each landing, or day or part of a day it shall lay at the landing or wharf.

"7. By this section it is provided that any steamboat or other boat or raft landing for the purpose of purchasing supplies only, and remaining only while purchasing and taking on such, and neither discharging or taking on any passenger or freight, shall not be required to pay wharfage fees."

The other pleadings and proceedings in the case are set out in the abstract, upon which the case is presented to this court, as follows:

"To the petition the defendant answered, admitting the city was a corporation under the general laws of Iowa for municipal purposes, admitting defendant was a corporation duly organized under the laws of Missouri, engaged in navigating the Mississippi river; admitting their boats landed at the port of Ft. Madison, one of its regular ports in navigating said river, as set out in the exhibit; admitting the wharfage fees were charged under the ordinances of Ft. Madison; denying plaintiff's right to levy or assess such wharfage fees, and de-

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fendants allege that the boats set out in such exhibit were each of more than twenty tons burden, and that they were each employed in navigating the Mississippi river from St. Louis, Missouri, to St. Paul, Minnesota, engaged in commerce between the states of Minnesota, Iowa, Wisconsin, Illinois and Missouri, and so landed at Ft. Madison, one of its regular ports, and that while so employed, and during the time shown by said exhibit, they each were duly enrolled and licensed for the coasting trade, under and by virtue of the laws of the United States, and in conformity with the several Acts of Congress, passed for the regulation of commerce and navigation; that the ordinance under which plaintiff claims wharfage was and is illegal and void, and is in violation of the Constitution and laws of the United States, and that the wharfage tax is illegal and void, and plaintiff has no right to recover same from defendant. And for further answer defendant alleged that the city of Ft. Madison had not built any wharf for the accommodation of boats landing at the city of Ft. Madison; that they have in places paved the street to the river, used by the citizens generally for all purposes of a street, for ferry landing, for pulling lumber from rafts, and that the street so paved by the city has been used by this defendant for a landing place, they having generally landed at the place designated by the wharfmaster of plaintiff, which was at the part of the street which had been paved by the city of Ft. Madison; that the river front of Ft. Madison, within its corporate limits, lying along the Mississippi river, is about two miles, being paved in these places in all about 600 feet only."

To this answer plaintiffs demurred because—

“1. The answer as a whole shows upon its face no defense in law, or as to the facts against plaintiffs' right to recover, and the same is insufficient in law.

“2. For that if defendants are engaged in commerce, it is no defense to their being charged by plaintiff as in petition claimed.

“3. And because in law said ordinances of plaintiff are legal and binding on defendant.”

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The demurrer was sustained, and, defendant standing on its answer, judgment was rendered for plaintiff.

3. In the third case the petition, in addition to other allegations, avers "that plaintiff is the owner of, and at great expense has paved and otherwise improved a certain wharf within its limits, for the purpose of creating and securing to steamboats landing at said city a convenient and secure wharf or landing place"; "that * * * defendant landed at said wharf with its steamboats," stating the name of the boats and the number of landings, and the charges therefor, and "that under the law of Iowa it is authorized to construct and regulate wharves, and to fix the fee or wharfage for landing thereat," and in pursuance of said authority the city passed the following ordinance providing for wharfage and fixing the rate of the same:

"SECTION 1. Be it ordained by the city council of the city of Burlington, that steamboats, keel boats, flat boats, and other water craft landing at, anchoring in front of, or within 100 feet of, any public landing belonging to or which may hereafter become the property of the city, or making fast to any part thereof, or to any vessel or other thing at or upon said wharf, or shall receive or discharge any passengers or freight, shall pay to the city at the rates following, for each and every such landing:

"All vessels and water craft under 100 tons at custom house measure.....	\$1 00
"All vessels and water craft over 100 tons, but under 200 tons.....	2 00
"All vessels over 200 tons	3 00
"Each and every barge which shall be detached from any vessel or water craft and left at any wharf in this city.....	1 00
"Flat boats and other craft running without regular license, and whose tonnage has not been certified.....	50
"And each and every vessel or water craft above specified shall pay a second like and corresponding amount for every twenty-four hours it remains at said wharf or landing after its first	

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twenty-four hours; said sum of money to be paid by the owner, captain, agent, or person in charge thereof, to the wharfmaster. This section shall have no application to the regular ferries of the city; providing no skiff, canoe or sail boat shall be included in the above.

“SECTION 11. All that part of the city abutting on the Mississippi river and lying between the sidewalks on Front street and said river is hereby declared the public landing of said city.

“*Be it ordained by the City Council of the City of Burlington:*

“SECTION 2. That it shall be the duty of the Harbor Master to collect from all steamboats, boats, rafts, and other water craft, such rates of wharfage as is hereinafter specified, or may be hereafter enacted, and to keep a true account of the same and to pay the amount and make a full statement thereof to the city treasurer, once in each month. He shall assign places for all steamboats, rafts and water craft, and for all freight landed, and shall possess all requisite authority to cause the same to be removed to the places so assigned. *Provided,* That no boat or water craft shall be compelled to leave any place while discharging or receiving freight, unless a landing at such place shall be prohibited by ordinance, or another landing shall have been previously designated by the Harbor Master.

“SECTION 4. There shall be collected wharfage from each steamboat which shall land, anchor at, or make fast in front of and within one hundred feet from the public landings aforesaid, the sum of (\$2.00) two dollars: *Provided,* That more than one landing within the term of twenty-four hours from the time of arrival and before departure for another port shall not subject any boat to additional wharfage; and from any steamboat remaining at the landing for a time exceeding twenty-four hours there shall be collected wharfage at one-half the above rate for each day of twenty-four hours during which said boat shall so remain after the day of her arrival.

“SECTION 5. That for the purpose of wharfage for all other

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boats and water craft the entire frontage of the city shall be deemed the levee (except such part as is heretofore excepted), and all boats and water craft landing at or anchoring or making fast within one hundred feet on such frontage (not including skiffs), shall pay the city therefor the following amounts: All rafts, irrespective of size, shall pay fifty cents per day for each landing day of twenty-four hours duration so landing. All barges shall pay fifty cents per day for each day or landing so made. All flat, wood or trading boats shall pay fifty cents for each landing or day so made.

"SECTION 9. All that part of the city abutting on the Mississippi river, and lying between the sidewalks on Front street and said river, is hereby declared the public landing of said city."

The second count of defendant's answer to plaintiff's petition is in the following words:

"2. And by way of further answer they allege they were a corporation, duly organized under the laws of the State of Missouri. That all of the boats named in the petition are boats of more than twenty tons burden, and were navigating the Mississippi river, engaged in commerce between the States of Minnesota, Iowa, Wisconsin, Illinois and Missouri, carrying freight and passengers, and were each duly licensed and enrolled for the coasting trade under and by virtue of the laws of the United States and in conformity to the several acts of Congress passed for the regulation of commerce and navigation; that the ordinances under which the same were levied were and are void and illegal and in conflict with the Constitution and laws of the United States, and plaintiff has no right to recover the same from defendant."

To this count of the answer plaintiff demurred, on the ground that it presented no defense in law to plaintiff's claim. The demurrer was sustained, and defendant standing on its answer judgment was rendered against it.

Judgments having been entered against the defendant in the several cases, it appeals in each.

Gillmore & Anderson and James H. Davidson, for appellant.

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John Gibbon for the appellee, the City of Keokuk.

Casey & Hobbs and *A. J. Alley*, for appellee, the City of Fort Madison.

Samuel K. Tracy, for appellee, the City of Burlington.

BECK, J.—I. The same question is presented in each of these cases, and involves the validity of the ordinances of the several cities, which are plaintiffs in the respective actions, under which wharfage dues are claimed of defendant. It is insisted that these ordinances are in conflict with several provisions of the Constitution of the United States, of the ordinance of 1787, and of the organic law of Wisconsin and Iowa, which forbid a State imposing imposts and duties on imports or exports and duties of tonnage; which forbid the states from regulating or levying taxes upon commerce, and which declare that the Mississippi river shall be a common highway forever, free to all the citizens of the United States without any tax, duty, impost or toll therefor. Constitution U. S., Art. 1, §§ 8, 9, 10, Ordinance 1787, Art. 4; Organic Law Wisconsin Territory, Act April 20, 1836, Sec. 12; Act admitting Iowa into the Union, March 3, 1845, Sec. 3.

If the ordinances of the three cities which are brought in question in these actions are in contravention of any of these constitutional or statutory provisions of the United States, they are invalid, and no act or authority done or exercised under them can be supported.

It becomes necessary to inquire first as to the character and nature of the charges or fees called wharfage, which the respective plaintiffs seek in the several actions to recover.

II. It will be observed by an examination of the pleadings in the cases that each city has erected wharves or steamboat landings upon the margin of the Mississippi river, within its boundary, for the use of steamboats and other vessels receiving and discharging freight and passengers at such city. The pleadings show in each case that the charges, sought to be recovered under the name of wharfage, are for the use of

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wharves or landings constructed and owned by the respective cities, at which defendant's steamboats had made landings and received and discharged freights and passengers. In the first and third cases the petitions allege the construction of the wharves at which defendant's boats landed, by the respective cities, the outlay of money by the cities for their construction and repair, and their ownership by the municipalities. These allegations are not denied, but the defense pleaded to the action is that the several ordinances are in conflict with the Constitution. The defendant claims that it is not liable under these ordinances to wharfage for the use of wharves erected by the cities, and kept in repair by them. This is the undoubted position assumed by the pleading.

III. In the second case the defendant alleges in its answer "that the city of Fort Madison had not built any wharf for the accommodation of boats landing at the city, that ^{1. MUNICIPAL} corporations: they have in places paved the streets to the river, ^{wharf: what} constitutes. used by the citizens generally for all purposes of a street, for ferry landing, for pulling lumber from rafts, and that the streets so paved by the city have been used by this defendant for a landing place; they (defendant) have generally landed at the place designated by the wharfmaster of plaintiff, which was at the part of the street which had been paved by the city of Fort Madison."

It is very plain that the paved street at which defendant's boats were landed comes within the designation of a wharf, which is constructed of stone and earth or timber, for the convenience of vessels in landing.

Where there is a tide, or where it is demanded by the motion of the water upon which the wharf is built, it extends into the bay or stream. Where there is little variation and sufficient depth of the water, and a smooth surface, the wharf is constructed of stone or timber upon the beach so that the vessel may lie broadside to the shore. As a matter of fact, of which we will take notice, all wharves upon the Mississippi river in this state are constructed in the manner last described. If it be constructed upon, or is an extension of the street into the river, it is none the less a wharf. The answer of defendant

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clearly shows that it landed its vessels at such a wharf built by the city of Fort Madison.

We are amply justified in holding that the pleadings in each case show that defendant used a wharf in each city constructed and owned by the city for the use and accommodation of steamboats and other vessels.

No objection to the judgments can be well founded on the ground that the petitions in these cases do not claim to recover for the reasonable and just value of the use of the wharves, but for the wharfage fees fixed by the ordinances.

If these ordinances prescribed that each boat landing at an improved wharf should pay the fees fixed therein, and contained ~~2~~ no provisions for collecting wharfage except where boats landed at improved wharves, the actions could be maintained for the wharfage fees for these reasons: The ordinances would be valid if the wharfage fees did not exceed just compensation for the use of the wharves. This cannot be doubted. The fees should be fixed and certain, and so graduated as to be equal upon all boats. The amount in each case should not be left to the caprice or judgment of the officer of the city collecting the fees. The power of the cities to fix, by ordinance, charges for wharfage, within the limits of just compensation, is recognized in *Cannon v. New Orleans*, 20 Wall., 557 (582). The only defense that could be made to the enforcement of valid ordinances of the character supposed, would be that the fees prescribed exceed just compensation and, therefore, operate as a tax upon commerce. The right to recover under the ordinance the fees prescribed therein, if a reasonable charge for the use of the wharves, would be admitted. The defense, therefore, that the fees are excessive should be pleaded. But in these cases the defendant has set up no such defense. Now if the ordinances are valid as to the wharves actually improved, which we shall hereafter see must be held, they may be enforced unless the defendant pleads and proves that the charges therein prescribed are beyond the limit of just compensation.

The questions raised in the pleadings involve the validity of the ordinances. It is not claimed that, if confined in their

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operation to wharves actually improved, they are valid. Defendant cannot claim that they must be held invalid because plaintiffs have not averred in their petitions that the wharfage fees are reasonable. The answers of defendant, to which plaintiffs demur, set up that the ordinances are wholly void—void for every purpose. The questions before us arise upon plaintiffs' demurrer. Now, if it be proved that the ordinances are not wholly void, but are valid to sustain wharfage fees for the use of wharves actually improved, the demurrer is well taken.

It may be remarked in this connection that the danger of fees and charges being levied under ordinances of the character of those involved in this action, whereby commerce may be affected, is purely imaginary, and does not in fact exist. If fees be authorized amounting to a tax upon commerce, being beyond just compensation for the use of improved wharves, they cannot be collected. To be valid, they must be within the limits of just compensation.

IV. The question presented for our decision, under the pleadings in these cases, is this: Are the ordinances of the plaintiffs, providing for the collection of wharfage fees for the use of wharves built and owned by the respective cities, in conflict with the provisions of the Constitution and laws of the United States?

These provisions are all intended to prohibit the levying of taxes upon the commerce of the country in the way of duties upon exports and imports, and imposts upon vessels engaged in commerce. The doctrines of the numerous cases, cited by defendant's counsel, interpreting these provisions are familiar. Whatever may be regarded as taxes of this character, or may abridge the free use of the Mississippi river by all the citizens of the United States is in conflict with the laws, constitutional and statutory, of the Union. *Gibbons v. Ogden*, 9 Wheaton, 1; *Brown v. Maryland*, 12 Wheat., 419; *Smith v. Turner*, 7 How., 283; *Sinnot v. Davenport*, 22 How., 227; *Almy v. California*, 24 How., 169; *Steamship Co. v. Port Warden*, 12 Wal., 204; *Peete v. Morgan*, 19 Wal., 581; *Cannon v. New Orleans*, 20 Wal., 577; *Hockley v. Geiagity*, 34 N. Y., 332; *People v. Raymond*, 34 Cal., 492.

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But the rule of these cases does not prevent a city from charging a reasonable compensation for the use of wharves erected by it for the convenience of commerce. And this is held in express words in *Cannon v. New Orleans*, 20 Wal., 577 (582).

Wharves are necessary or convenient for vessels engaged in commerce, and when provided, though proper and reasonable charges are required for their use, they aid the prosecution of commerce. A municipal ordinance, therefore, which provides for wharfage fees which are not excessive cannot be regarded as a regulation affecting prejudicially the interests of commerce or the freedom of the river upon which it is constructed.

Such wharfage fees are not to be regarded as a tax. They are levied as a compensation for the use of the wharves. In ~~4—~~: the exercise of their police powers the cities of ~~4—~~ the State may control the landings of boats, designating the place they shall receive or discharge freight and passengers. It is within their power to require this to be done at these wharves and to charge reasonable compensation therefor. *The City of Dubuque v. Stout*, 32 Iowa, 80. This doctrine is founded upon the clearest reason, well understood by all persons familiar with the transaction of business upon the Mississippi river.

It cannot be doubted that wharves are not only convenient but necessary for the transaction of business with vessels navigating the river. They are necessary to enable consignees to receive and remove their goods and protect them from loss. The banks and margins of the river are in most cases of clay and alluvion. Goods delivered from vessels upon them in their natural state could not be handled and would be subject to injury on account of their muddy and swampy character. We have seen that cities may build wharves and charge for their use a sum that would be a just compensation. Now unless they have power to compel vessels to land at the wharves, the masters of vessels, in order to escape payment of wharfage fees, may discharge and receive cargoes on the natural banks of the river, to the inconvenience and loss of shippers and consignees. This power is necessary to enable the cities

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to exercise their police authority in providing places for the landing of vessels. It has never been doubted that the police power of the State, exercised through the municipal corporations, may regulate in this way transactions connected with commerce. We will not be expected to cite authorities in support of a doctrine so familiar. It is fully recognized in the case which we now proceed to consider.

V. *Cannon v. New Orleans*, 20 Wal., 577, is confidently relied upon by defendant to support its claim of exemption from wharfage fees provided for by the ordinances of the cities brought in question in these actions. It was decided upon the following facts: The city of New Orleans made an ordinance providing that, "from and after the first day of January, 1853, the levee and wharf dues on all steamboats which moor or land in any part of the city of New Orleans shall be fixed as follows: ten cents per ton if in port not exceeding five days, and five dollars per day after said five days shall have expired."

Under this ordinance the action was brought to recover back money paid by the owner of a steamboat and to enjoin further collection under the ordinance. The United States Supreme Court held the ordinance invalid, regarding the dues collectible under it as a tax, not as compensation for the use of the wharf. This language is used: "A tax which, by its terms, is due from all vessels arriving and stopping in a port without regard to the place where they may stop, whether it be in the channel of the stream, or out in a bay, or landed at a natural river bank, cannot be treated as a compensation for the use of a wharf."

In the cases before us the wharfage fee is charged only against vessels landing or mooring to the wharves or to any vessels at the wharves, or, as in the last case, mooring within one hundred feet of the wharves.

But the controlling point of difference between that case and these now before us, is this: In these it appears that defendant did use the wharves erected by the cities, and there is no claim that the wharfage fees sought to be recovered are unreasonable. It does not appear that in *Cannon v. New Orleans*,

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the boat owner used any wharf in the city; at all events, the fact that he did moor his vessel to the city wharf was not relied upon to support the right of recovery, and no question based thereon was presented to the court.

VI. But it is claimed the ordinances in the case before us are void because they provide for wharfage fees where boats are not moored to a wharf; that all the river bank within the city is declared to be wharves, and the city cannot exact compensation from vessels that land at the bank where no wharves have been constructed.

5. — : wharfage fees: constitutional law.

There are two answers to this objection. The first is that under *The City of Dubuque v. Stout*, 32 Iowa, 80, the city may control the landing of vessels, fixing places by ordinance or otherwise where they shall receive and discharge freight and passengers. The ordinances in these cases are intended to have the effect of preventing boats, in order to escape charges lawfully made for the use of a wharf, from discharging and receiving freight at places where no wharves have been constructed, which would be to the inconvenience and loss of shippers and consignees.

VII. The other answer is this. Statutes which are partly in conflict with the constitution will be held void no farther than as to those parts which are unconstitutional; provisions which are within the limits of legislative authority will be enforced. *Santo v. The State*, 2 Iowa, 165; *Walters v. Steamboat Mollie Dozier*, 24 Iowa, 192; *The City of Des Moines v. Layman*, 21 Iowa, 153; *Childs v. Shower*, 18 Iowa, 261; *High School v. County of Clayton*, 9 Iowa, 175; *The County of Louisa v. Davison* 8 Iowa, 517; *The Dist. Tp. of Dubuque v. Dubuque*, 7 Iowa, 262; *Duncan v. Sigler, Morris*, 39.

City ordinances, like statutes, will be upheld to the extent of provisions authorizing the exercise of power clearly within the scope of the municipal authority, while other provisions in excess of such authority will be held void. Dillon's Municipal Corporations, § 354, and notes. But if the parts of the statute or ordinance be necessarily connected and dependent, the whole must fall with the void part.

The rule must be extended to the case of a statute or ordin-

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ance authorizing two or more acts, one of which is within, and the other without, legislative authority. The first act when done under such statute or ordinance will be valid, the second void.

The several ordinances of the respective cities, it is insisted by defendant, authorize the collection of wharfage fees from boats that do not land at the wharves of the cities. This, for the purpose of the argument, may be admitted. They authorize the collection of the fees in cases where boats use the wharves owned by the cities. The collection of the fees in the first case, it may be here conceded, is not within municipal authority; in the second case it is not forbidden by the constitution and laws of the United States; it may be done in the last, but is forbidden in the first.

The doctrines presented in these views are not infrequently applied to taxation. Where taxes are levied by the same ordinance or act of a corporation, some of which are not authorized by its charter, these would be void; those within the corporate powers would be valid.

VIII. The point upon which we base our decision in these cases, namely, that the cities under the ordinances may recover for the actual use of improved wharves, was not made nor decided in *Cannon v. New Orleans*. The question discussed and decided in that case was whether the ordinance of New Orleans, in its full breadth, was valid. The Supreme Court of Louisiana held it valid in its every provision and to its full extent. It was not claimed in the United States Supreme Court that it would be valid against vessels using improved wharves, and void as to vessels landing at the natural bank of the river. We may not inquire why the point raised in these cases was not presented and discussed in that. It is sufficient to know that it was not, and of course no discussion was made thereon. The case is, therefore, not authority against the conclusion we reach, but as we have pointed out is in harmony therewith.

IX. The wharfage fees provided by the ordinances of the cities of Keokuk and Burlington are based upon tonnage duty, and fixed by the tonnage of the vessels landing at

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the wharves. It is insisted that this is a tonnage duty and is obnoxious to Art. 1, § 10, par. 10, of the Constitution of the United States, which forbids the imposition by the states of such imposts.

It must be admitted that this constitutional inhibition is directed against taxation and is intended to protect therefrom the cargoes of vessels engaged in commerce. Imports and exports may be subjected to duties by charges levied upon vessels engaged in commerce. This is simply a form of taxation. The constitution, in the clause inhibiting duties upon tonnage, in terms forbids taxes levied in that manner; the word *duty* means a tax, toll, impost, or custom.

The wharfage fee charged under the city ordinances in question is in no sense a tax. It is a charge made as compensation for the use of the wharves built and maintained for the benefit of vessels engaged in commerce. The distinctions between such a charge and a tax, toll, impost, or custom is too obvious to admit of discussion.

The fact that the wharfage fee is graduated by the tonnage of the vessel does not require us to regard it as a "duty on tonnage." The tonnage of the vessels using the wharves of the cities affords a convenient and just measure of the fees charged, which should be varied according to the size of the boats, the larger occupying more space at the wharves than those of less capacity.

The foregoing discussion disposes of all points presented in the several cases. The judgment in each is

AFFIRMED.

SEEVERS, Ch. J., *dissenting*.—My reasons for dissenting from the foregoing opinion are:

I. The right to recover a reasonable compensation is based on the fact that the boats of the defendant landed at the constructed wharves. There is no count in the petitions basing the right to recover on a *quantum meruit*. The theory upon which a recovery is sought is, that the plaintiffs possessed the power to establish and construct wharves; that by ordinance such have been established and constructed, and a compensa-

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tion for their use fixed thereby. It is that compensation fixed by the ordinance for which a recovery is sought in these actions, and not a reasonable one for the voluntary use of wharves constructed by the city.

The compulsory use of anything can never be the basis of a reasonable compensation for its use. Under the ordinances the defendant was compelled to pay just as much if the vessels were landed anywhere in the city limits, or anchored in the stream, as at the constructed wharf. Whatever might be the rule under proper pleadings as to the recovery of a reasonable compensation, no such question is presented in the record in these cases.

II. I am unable to distinguish the ordinances in question from that in *Cannon v. New Orleans*, 20 Wal., 577. The port of New Orleans was twenty miles in length, and the constructed wharf only two; but this fact was not deemed material by the court. If, however, it was of importance, the proportion of established to constructed wharf in the Fort Madison case is fully as great as in the New Orleans case—the established wharf being about two miles and the constructed about six hundred feet.

The ordinances in all the cases constitute the whole city front a wharf, and in one case the wharf extends to the middle of the main channel of the river, and in another to one hundred feet in front of any public landing. It is not shown in either of these cases along how much of the city front wharves have been constructed. If such wharves extend the whole length of the city front, the plaintiff should have so averred.

The burden was on the plaintiffs to establish such fact. It does not appear whether the vessel landed at the constructed wharf or not in the New Orleans case. It follows, however, that this circumstance, in the opinion of the court, made no difference, or it would have been alluded to. If the vessel landed, in the New Orleans case, at the constructed wharf, then, according to the opinion of the majority of this court, the judgment should have been in favor of the city. Evidently this fact, in the opinion of the Supreme Court of the United States, was not deemed material. It is intimated as the city

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has, under the police power, the right to compel vessels to land at certain designated places within the limits of the city frontage, that it necessarily follows they may be compelled to land at a constructed wharf, and compensation collected therefor.

I do not impugn the correctness of the rule laid down in *Dubuque v. Stout*, 32 Iowa, 80; but I do deny that any such consequence as compensation for the use of the wharf follows. That case has nothing whatever to do with the subject under consideration. The decision is based solely on the police power, and has no bearing on the question whether these ordinances are void because in conflict with the Constitution of the United States. Even if wrong in this, I recognize the principle that in this class of questions the decisions of the Supreme Court of the United States are conclusive in this court. As I have said, these cases cannot be distinguished from the New Orleans case, and this court is bound thereby.

It is said in that case "the tax is therefore collectible for vessels which land at any point on the banks of the river, without regard to the existence of wharves." The same result must follow in the cases at bar, for the facts and purport of the ordinances are identical.

It is also said in that case: "The tax is also the same for a vessel which is moored in any part of the port of New Orleans, whether she ties up to a wharf or not, or is located at the shore or in the middle of the river." Here, again, the same result must follow, for the ordinances in this respect are identical.

It is further said in that case: "A tax which by its terms is due from all vessels arriving and stopping in a port, without regard to the place where they may stop, whether it be in the channel of the stream, or out in the bay, or landed at a natural river bank, cannot be treated as a compensation for the use of a wharf." Here, again, the cases at bar fulfill exactly all the conditions and limitations above stated. In the opinion of the majority of the court stress is laid on that portion of the opinion in the New Orleans case which intimates that a reasonable compensation may be recovered for the use of a con-

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structed wharf. What is meant in that case as to such recovery is simply this: The power of the city is likened to that of an individual, and if the city under its charter has the power and does construct a wharf, a reasonable compensation may, by ordinance, be collected from vessels using it; but the city cannot, by ordinance, establish a wharf, construct it, and then provide that vessels landing at the natural bank of the river or mooring in the stream shall pay wharfage dues. Such dues are neither more or less than a tax for stopping in port, and not compensation for the use of the wharf.

If, under the police power, vessels may be required to land at the constructed wharf, and the right to compensation follows because of this compulsory use, then the Constitution of the United States is but a rope of sand, and vessels engaged in commerce on the navigable waters of the country are at the mercy of every municipality located on the borders of the stream. Such power might be so exercised as to annihilate and destroy the commerce of the Mississippi river.

It is maintained that one part of the ordinances may be held valid even though another portion be void. While I concede there is such a rule, I deny its application to the ordinances in question, for the reason that there is but a single subject matter contemplated thereby. There is nothing said as to constructed wharves or any charge made for landing vessels thereat. Nor do they contain two separate prohibitions relating to different acts with distinct penalties for each. I am, therefore, unable to see how one part can be held valid when another part is void, or rather how the subject matter can be separated or divided by judicial construction, when the ordinances define and contemplate but a single subject matter as a distinct whole: The length of this dissent forbids that I should further enlarge on this subject. In my opinion the judgment of the court below should be reversed.

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WAYT v. THE B., C. R. & M. R. CO.

1. **Evidence: CONFLICT OF PRACTICE.** Where there is a conflict in the evidence, a judgment will not be reversed because there was not sufficient evidence to sustain the verdict.
2. **New Trial: NEWLY DISCOVERED EVIDENCE.** Where the application for a new trial on the ground of newly discovered evidence shows that the evidence is material and not cumulative, and that reasonable diligence was exercised to discover it, the new trial should be granted.
3. **—: CUMULATIVE EVIDENCE.** The admission of a party is not evidence of the same kind as the testimony of other witnesses, and therefore is not cumulative, although relating to the same controverted fact.

Appeal from Linn District Court.

WEDNESDAY, DECEMBER 13.

THIS is an action for damages for a personal injury. There was trial by jury, verdict and judgment for plaintiff, and defendant appeals.

J. & S. K. Tracy, for appellant.

I. M. Preston & Son, for appellee.

ROTHROCK, J.—I. The plaintiff was a passenger on defendant's train, and in crossing a bridge between Cedar Rapids and Vinton, which was undergoing repairs, while sitting at an open window in a passenger coach, his arm was broken, either because of some object projecting into the car through the window, or by reason of plaintiff's permitting his arm to protrude beyond the window and outside the car, and thus coming in contact with some object. The main controversy on the trial was as to the position of plaintiff's arm when he received the injury; it being conceded that if some object projected into the car and injured him the defendant was liable; but if the plaintiff carelessly permitted his arm to protrude through the window and outside the car, and was thus injured, he could not recover.

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The instructions of the court to the jury were based upon this idea, and with the instructions the parties were content.

1. ^{conflict of:} EVIDENCE: There is no doubt of the correctness of the instructions given. They are fully sustained by authority, and are based on sound reason.

The first error assigned and argued is that the verdict was not sustained by sufficient evidence and was contrary to law. The most that can be said on this question is that there is a conflict in the evidence. The plaintiff testified that his arm did not extend beyond the window, and, although there was evidence tending strongly to show the contrary, it was for the jury to determine this question of fact, and we are not prepared to say that the verdict was so manifestly against the evidence as to require a reversal of the case under the rule so often announced by this court.

The original answer alleged that the plaintiff carelessly and negligently permitted his arm to project beyond the case of a window of the car in which plaintiff was seated, whereby the said plaintiff's arm came in contact with a *stick of timber* and was broken. The defendant's evidence tended to show that plaintiff's arm was outside the window, and was broken by a *rope or ropes* attached to certain hoisting apparatus near the railroad track. After the evidence was closed defendant amended the answer by inserting the words "rope or ropes," before the words "stick of timber," so as to make the allegation conform to what defendant's counsel claimed the proof to be.

Counsel for plaintiff insists that the evidence is sufficient to sustain the verdict, because they are entitled to have the admission in the original answer, that the injury was occasioned by a stick of timber considered in determining the question. It may be proper to say that we arrived at the conclusion that the verdict is sufficiently supported by the evidence, without considering this as an admission of a fact. The court below instructed the jury that the allegation that plaintiff's arm was struck by a stick of timber was an immaterial allegation, and should in no manner influence them in deciding the case. No exceptions were taken to this instruction by plaintiff; he

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does not appeal, and it was the duty of the jury to follow the instruction which we presume they did. But aside from this consideration we believe the instruction to be correct.

The allegation of the answer in question was not in the nature of the distinct admission of a material fact. It was merely descriptive of the manner in which the injury was received, and did not relieve plaintiff from establishing all the material allegations of the petition by competent evidence.

II. The only other assignment of error is that the court erred in overruling defendant's motion for a new trial, based on 2. ~~new trial:~~ the grounds of newly discovered evidence, mate-
~~newly dis-~~ rial for defendant. The defendant with the motion
~~covered evi-~~ dence. for new trial exhibited certain affidavits. One of
these was made by one George Goodrich, who states that at
the time of the injury he was in the same car, and in the
same seat with plaintiff, that he particularly noticed plain-
tiff, and knows that his arm was out of the window when
it was broken. Another affidavit, by Carrie Norton, states
that she was a passenger in the same car with plaintiff
and particularly noticed his position, and that she knows
his arm was out of the window at the time it was broken.
Another affidavit, by Jno. W. Traer, is to the effect that
in the summer or fall of 1874 he had a conversation with
plaintiff in which he admitted that at the time of the accident
his arm was protruding out of the window, and that after-
wards in another conversation plaintiff made the same admis-
sion. There is also the affidavit of G. W. Edwards, general
agent of the defendant, whose duty it was to look up evidence
and prepare cases for trial, and the affidavit of A. S. Belt, one
of the attorneys of defendant, upon the question of the diligence
exercised by them in collecting evidence. Without setting out
these affidavits particularly, it is sufficient to say that we believe
they establish such diligence that the motion for new trial
should not have been overruled for want of a sufficient showing
on that question. They do not consist of mere general allega-
tions of diligence, but they set out what acts affiants did to
discover and collect evidence. That the evidence in question
is material must be conceded. If the testimony of either one

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of these witnesses had been before the jury, and the jury had believed the same to be true, the verdict should unquestionably have been for the defendant.

Another and a more difficult question is as to whether the newly discovered evidence is merely cumulative. It may be considered as settled law that a new trial will not be granted because of the discovery of evidence which is merely cumulative in its character. Graham & Waterman on New Trials, 486, 495, and cases cited; *Manix v. Malony*, 7 Iowa, 81; *Sturgeon v. Ferron*, 14 Id., 160; *Alger v. Merritt*, 16 Id., 121; *German v. The Maquoketa Savings Bank*, 38 Id., 368.

In the last case above cited it is said: "It is exceedingly difficult, if not impossible, to furnish a general definition of cumulative evidence, which in a given case will materially aid in determining whether particular testimony offered falls within, or without, that class." In 1 Greenleaf on Evidence, Sec. 2, it is said: "Cumulative evidence is evidence of the same kind, to the same point. Thus, if a fact is attempted to be proved by the verbal admission of the party, evidence of another admission of the same fact is cumulative."

Evidence is not necessarily cumulative because it tends to establish the issue which was mainly controverted on the trial. Under the rule as laid down in Greenleaf on Evidence, above cited, the evidence must not only be to the same point, that is to the same fact in controversy, but it must be of *the same kind* as that produced on the trial. Applying this rule to the affidavit of Traer, his evidence therein contained is not cumulative. No witness on the trial testified to any admission of the plaintiff, as to his position at the time of the accident. The affidavit of Traer was original evidence of a kind different from any produced on the trial.

It is urged by counsel for plaintiff that Traer was a director of the defendant, and that, knowing of the admission sworn to by him, the defendant should be held to have knowledge thereof, or that it was his duty to communicate the fact to the proper officer of the defendant. The satisfactory answer to this is that the affidavit of Belt shows that it was no part of the duty of

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Traer to look up evidence, or to assist in the preparation of cases for trial and at the time of the trial and for several months before, the defendant's road was in the hands of a receiver, who had full control of this suit to the exclusion of the directors or other officers of the company.

There is more ground for the claim that the evidence contained in the affidavits of the other witnesses is cumulative, and still we confess to great doubts on that question. As we find, however, that the evidence of Traer was not cumulative, that it was material, and that the defendant is not properly chargeable with a want of diligence in failing to discover it before the trial, we think the court below erred in not sustaining the motion for a new trial.

REVERSED.

MINER, BEAL & HACKETT v. AUSTIN.

1. Administrator: Ancillary Administrator: Rights of Non-Resident Creditors. Non-resident creditors have the right to prove their claims under an ancillary administration; if the ancillary estate is solvent, the administrator may proceed to pay the claims against that estate in full, unless it be shown that the principal estate is insolvent, in which case the non-resident creditors are entitled to share in the ancillary estate. Whether they should be postponed in respect to all payments from the ancillary estate until they have exhausted their claim upon the principal estate, *quære*.

Appeal from Linn Circuit Court.

WEDNESDAY, DECEMBER 13.

THE defendant's intestate died in Cook county, Ill., and letters of administration were issued there upon his estate. He left property, however, in Linn county, Iowa, to the amount of about \$6,000, and letters of administration were issued there. The plaintiffs have a claim against the estate to the amount of about \$60,000, which claim was filed and allowed in the Probate Court of Cook county, Ill., the forum of the principal or domiciliary administration, and they now ask for

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an allowance of the same claim in the Circuit Court of Linn county, Iowa, the forum of the ancillary administration.

A claim to the amount of about \$2,000 has been allowed in the said Circuit Court to a creditor who is a resident of Iowa. The plaintiffs are residents of Massachusetts. The Circuit Court refused to allow their claim, and they now appeal to this court.

I. M. Preston & Son, for appellants.

Mills & Blake and W. G. Thompson, for appellee.

ADAMS, J.—The plaintiffs' claim was resisted and disallowed on the ground that the Iowa creditor was entitled to be paid

1. ADMINIS-
TRATOR: an-
cillary admin-
istration:
rights of non-
resident cred-
itors. in full by the ancillary administrator as against non-resident creditors whose claim had already been filed and allowed in the court of the principal administration. In support of this view our attention is called by counsel for the appellee to the case of *Dawes v. Head*, 3 Pick., 128, and especially to the following words: "The current opinion of the different courts of the United States is strongly in favor of the jurisdiction, and that the claims of the suitors here and of our own citizens who are creditors shall be preferred." This statement, however, appears, by reference to the case, to be contained, not in the opinion of the court, but in the brief of counsel. We have to examine, therefore, and determine for ourselves whether it is the current opinion of the different courts of the United States that resident creditors in such a case are entitled to a preference. In Wharton's Conflict of Laws, Sec. 640, it is said: "An ancillary administrator must satisfy in full the creditors of his jurisdiction, even though the principal administration be insolvent." This statement is based upon *Cook v. Greyson*, 2 Drewry, 286, and *Pardo v. Bingham*, Law Reporter, 6 Eq., 485; neither of which decisions is American. We have then to proceed a little farther in order to determine what is the doctrine of the courts of the United States.

In Redfield on Wills, 3d Vol., page 29, it is said: "As no creditor out of the ancillary administration can present his

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claim before the commission of the ancillary administration, the personal representative can, strictly speaking, know nothing of any other creditor. All claimants except local creditors should more properly be referred to the principal administration." This statement is based upon *Richards v. Dutch*, 8 Mass., 506, and *Dawes v. Boylston*, 9 Mass., 337.

So far as the assumption is concerned that no claims can be allowed under the ancillary administration except those of local creditors, there is not only no warrant for it in the cases cited, but it is directly in conflict with a later decision in Massachusetts, as we will show hereafter.

In *Hunt v. Fay, Adm'r.*, 7 Vt., 170 (183), the court said: "Considering the administration where the intestate had his domicile as the principal administration, and that the creditors must resort there for the purpose of substantiating their claims, and that all personal assets must ultimately be transmitted for that purpose to the principal administrator, if the funds collected by the auxiliary administrator are necessary for the purpose of paying debts against the estate, and if not wanted are to be distributed among those entitled thereto by the principal or auxiliary administrator as the courts where the funds are collected shall deem expedient, subject to the claims which the citizens of the government have upon the funds within their jurisdiction, we think that the citizens of no other State can come in to claim a share in the funds of a subordinate administrator, and that the object of a commission in the State where the second administration is granted is only to ascertain the claims of creditors within that State who are to be paid before the funds collected are suffered to be transmitted; that to permit any creditor not living within the jurisdiction where the auxiliary administration is granted to come in for a share of the effects found there would be unjust and inequitable,—would give them an undue advantage, and present great embarrassment in the settlement of estates." The foregoing might be considered as an authority for the doctrine for which the appellee contends, were it not for the fact that the right of the plaintiff to prove his claim was denied upon the ground that he was a resident of the State of

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New Hampshire, in which was the principal administration, and he had failed to present his claim for allowance in that State within the time allowed in that State. Besides, if the doctrine of the quotation could be regarded as more than a dictum it would be weakened somewhat as authority by the dissent of MATTOCKS, J., who says: "The circumstance of the creditor being a resident of New Hampshire is of no importance. To allow the citizens of Vermont to present their claims here and not those of New Hampshire is, in my view, without any good reason and would equally exclude creditors dwelling in New York or Massachusetts; and the inconveniences of these exclusive and particular allowances near the lines of the State where creditors reside, and property real and personal is often owned by the deceased in two States, especially where there is an actual insolvency, would be very great, and what is believed has not hitherto been understood or practiced." If we may except the decision in this case, as authority for the appellee, we may say that we have seen no American case that is.

On the other hand we have to say that we have seen but one case where the precise question has been drawn in issue, that can be regarded as authority for the appellant, and that case lacks one or more elements which exist in the case at bar. It is in point so far as the question of the preference of resident creditors is concerned. In *Davis v. Esty et al., Adm'rs.*, 8 Pick., 475, the defendants' intestate resided in Vermont at the time of his death and administration was granted to them there.

The intestate owned property in Massachusetts and ancillary administration was granted to the defendants in that state. The estate was insolvent. The plaintiff was a creditor residing in Massachusetts, and presented his claim in that state. The court said: "The property in Vermont by the administrators is to be accounted for there; but the property in this commonwealth is liable to a certain extent to the debt here. As the estate is insolvent, a creditor here is not to be paid his whole debt to the prejudice of creditors in Vermont, but only a *pro rata* dividend. There is no difficulty in this case as to the *modus operandi*. Judgment is to be taken for the whole

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debt, but no execution is to issue. The administrators will ascertain the amount of the assets and debts in both states, and pay the creditors here *pro rata*." This ruling, it is true, is not inconsistent with the ruling of the court below, if its ruling had been made wholly upon the ground that the plaintiff's claim had been allowed under the principal administration, and that the assets under both administrations must be divided *pro rata* among all the creditors whose claims have been allowed under the one administration or the other. But an objection was made to the allowance of the plaintiff's claim on the ground that the Iowa creditor was entitled to be first paid in full out of the Iowa assets, and we will assume that the ruling of the court below was based in part at least upon that ground, especially as this is the principal question which counsel have presented in their arguments. We will proceed then to inquire as to whether a distinction should be made between resident and non-resident creditors.

On this point it is proper to say that there is nothing in the Code to indicate that there should be. On the other hand, the Constitution of the United States provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." It is true that it has been sometimes thought that this provision does not apply to the respective rights of resident and non-resident creditors to the estate of a deceased debtor held under an ancillary administration. In *Hunt v. Fay, administrator*, above cited, the court said: "There are some privileges and immunities which are necessarily connected with the residence of the citizen, which cannot be enjoyed by those residing elsewhere, and the right of resorting to the funds of a deceased debtor within the territorial limits of a state may be one of them." But this assertion is not sustained by any very satisfactory reasoning, and it is doubtful whether it can be. In *Goodall v. Marshall*, 11 N. H., 95, the court thought that the constitutional provision had application to such a case.

Without dwelling upon this question, upon which we might not arrive at a satisfactory determination, we may observe that it has been thought that the rights of non-resident creditors

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in such a case may be placed upon broader ground. In *Dawes v. Head*, 3 Pick., 128, PARKER, J., says: "We cannot think that in any civilized country advantage ought to be taken of the accidental circumstance of property being found within its territory which may be reduced to possession by the aid of its courts and law to sequester the whole for the use of its own subjects or citizens, and where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government." In *Goodall v. Marshall*, above cited, PARKER, J., says: "If the creditors of the domicile may pursue the property of the debtor in his life time in another government, equally with the citizens of the government where the property is situated, no sound reason suggests itself why they should be debarred of a remedy, and the property be appropriated exclusively, or in the first place, to the satisfaction of the creditors in the latter government on his decease. Even if, by permitting them to come in, the property may be insufficient to pay all, and the creditors in the government where the property is situated be thereby compelled to resort to the principal administration where the debtor had his domicile, or to lose their debts or a portion of them, this result is not other than might have been attained in the life time of the debtor by his withdrawal of the property from their jurisdiction."

In Kent's Com., 2d vol., 434, it is said: "The intimation has been strong that such an auxiliary administrator, in case of a solvent estate, was bound to apply the assets found here to pay debts due here, and that it would be a useless and unreasonable courtesy to send the assets abroad and the resident claimant after them. But if the estate was insolvent, the question became more difficult. The assets ought not to be sequestered for the exclusive benefit of our own citizens."

Upon principle and authority we have come to the conclusion that non-resident creditors have the right to prove their claims under an ancillary administration. How distribution should be made is a different and more difficult question. If the assets in the hands of the principal administrator are suffi-

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cient to pay all the claims allowed in the forum of the principal administration, and the assets in the hands of the ancillary administrator are sufficient to pay all the claims which have been allowed in the forum of the ancillary administration, no difficulty can of course arise. If the ancillary estate is solvent, we think that the ancillary administrator may proceed to pay the claims against that estate in full, unless it is shown in the forum of the ancillary administration that the principal estate is insolvent. What should then be done, it is not necessary for us now to determine. In *Dawes v. Head*, above cited, it is said: "The proper course would undoubtedly be to retain the funds for a *pro rata* distribution according to the laws of our state, among the citizens thereof, having regard to all the assets either in the hands of the principal administrator, or of the administrator here, and having regard also to the whole debts which, by the laws of either country, are payable out of those assets." We can but express a doubt whether that rule would not be found in practice to involve too great complications and delay. But the case which we have before us is one where the ancillary estate is insolvent (or will be if the plaintiffs' claim is allowed, as we hold it should be), and there is no evidence as to whether the principal estate is solvent or insolvent. If it is solvent, it is clear that the plaintiffs whose claim has been allowed against it should receive their payment from it. But if it is insolvent, and cannot pay as large a per centage as the ancillary estate could pay if no claims were allowed against it except those which are allowed against it alone, then the plaintiffs would be entitled to share in the ancillary estate; and inasmuch as this may happen, we hold that the Circuit Court erred in disallowing their claim. But justice would seem to require that they should not in the aggregate receive a larger per centage than those whose claims have been allowed against the ancillary estate alone. Whether they should be postponed in respect to all payments by the ancillary administrator until they have exhausted their claim upon the principal estate, is a question not necessarily raised by the record, and we forbear expressing an opinion upon it.

REVERSED.

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BARR V. VAN DUYN.

1. **Contract: construction of: rescission.** Where the owner of a horse placed him in the hands of another to be trained and driven for a specified time, reserving to himself the right to take possession of the animal whenever he became dissatisfied with the manner in which he was kept and trained, he was not entitled to take the horse from the trainer without showing some negligence or ill treatment on the part of the latter, or other grounds justifying him in rescinding the contract.
2. —— : —— : **DAMAGES.** The trainer was entitled, after the rescission of the contract, to the reasonable value of his services in training and keeping the horse during the time he was in his possession.

Appeal from Black Hawk Circuit Court.

WEDNESDAY, DECEMBER 13.

THE petition of plaintiff alleges that he entered into a verbal agreement with defendant to take, drive and train his horse during the seasons of 1875 and 1876, in consideration of which defendant agreed to furnish plaintiff with money to the extent of five hundred dollars, to enable him to enter said horse at county fairs and other races during said seasons, and to pay all actual disbursements necessary in traveling with said horse, including shoeing, keeping and other expenses; that plaintiff was to have as compensation for his services and keeping said horse two-thirds of all premiums won by said horse after refunding to defendant the money advanced by him; that in pursuance of said agreement plaintiff took, kept, trained and worked the horse from the 1st of May to the 9th of October, 1875, when defendant wrongfully, without plaintiff's knowledge or consent, took the horse from plaintiff's possession, and refused to further comply with the contract; that defendant refused to furnish money to enter said horse at any fair or race during the season of 1875, whereby plaintiff was prevented from winning anything with said horse; that the actual value of the keeping, shoeing and training of said horse, whilst plaintiff had possession thereof, was the sum of

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\$1.50 per day, amounting to the sum of \$250. For this sum plaintiff asks judgment.

The answer of defendant denies the allegations of the petition, and alleges that it was verbally agreed between plaintiff and defendant that plaintiff should take the horse of defendant, properly drive, train, take care of, and bear all the expenses of said horse during the season of 1875, and should pay to defendant one-third of the earnings of said horse; that plaintiff was to retain possession of said horse until such time as defendant should become dissatisfied with plaintiff's method of training, driving, and caring for said horse; that, under said agreement, plaintiff took and retained possession until October 9th, 1875, when defendant became dissatisfied with plaintiff's treatment of said horse and took the same from his possession. There was a jury trial, and a verdict and judgment for plaintiff for \$182.25. Defendant appeals.

Miller & Preston, for appellant.

Boies, Allen & Couch, for appellee.

DAY, J.—I. The plaintiff introduced evidence tending to establish a contract as set forth in his petition. The defendant introduced evidence tending to establish the contract set forth in the answer. It was also proved that defendant took the animal away about the time alleged.

The court gave the following instruction: "If the defendant, by the terms of the contract, reserved the right to retake possession of the horse whenever he became dissatisfied with plaintiff's manner of training or caring for the horse, in such case defendant would have to show negligence or ill treatment of the horse by plaintiff, or other good cause for taking possession of the horse before the expiration of the full time agreed upon by the parties, in order to avoid liability in doing so."

The giving of this instruction is assigned as error. If it should be conceded that, if the contract was as defendant ^{1. CONTRACT: claims, he might take the horse into his posses-} construction _{of: rescission.} sion without showing negligence of plaintiff, or

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ill treatment of the horse by him, still we think the instruction was error without prejudice. The defendant alleges in his answer that plaintiff was to retain possession of the horse, not merely until defendant should become dissatisfied, but until he should become dissatisfied with plaintiff's method of training, driving and caring for the horse. It is incumbent upon defendant to prove the existence of the facts upon which he relied to justify him in taking the horse into his possession.

The abstract contains all the evidence, and there is no proof that defendant was dissatisfied in any respect. All the testimony upon the subject of retaking the animal is as follows: "He kept the mare until about the 16th of October, 1875, at which time I took her away." It may be admitted that the fact that defendant took the horse into his possession is proof that defendant was dissatisfied with something; but it is no proof that he was dissatisfied with plaintiff's method of training, driving and caring for the horse. The defendant, then, did not prove the existence of any circumstances which authorized him, even under the contract as he claims it to be, to take the horse from plaintiff. An erroneous instruction as to what, in law, would justify him in taking the horse, was, therefore, error without prejudice. For the same reasons there was no error in refusing to give the instruction asked by defendant.

II. The court further instructed as follows: "If you find the foregoing issues for plaintiff you will then have to determine: mine the amount of plaintiff's damages. And damages. these, under the issues presented by the pleadings, would be the reasonable value of the plaintiff's services in taking care of and training the horse, and the reasonable value of the keeping of the horse during the time plaintiff kept him, and in such case, your verdict should be for plaintiff for this amount." The giving of this instruction is assigned as error.

It is claimed that if the contract was as plaintiff insists, the only measure of damages to which he is entitled is the fair two-thirds value of the use of such an animal for the season

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of 1876. The defendant, by taking the animal into his possession, rescinded the contract; he placed it beyond the power of plaintiff to secure any remuneration for his services, as prescribed in the contract. The plaintiff sets up this act of rescission, and claims the reasonable value of the services rendered. We have no doubt that he is entitled to this under the issues made.

This instruction being proper, there was no error in admitting the testimony, to which defendant objected, upon the subject of damages.

AFFIRMED.

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94	303
45	231
102	56
45	231
107	230
45	231
111	364
45	231
120	723

1. **Evidence: HUSBAND AND WIFE: PRACTICE.** In a civil action the husband and wife are not competent witnesses against each other, but objections to their competency should be made when they are sworn, or when it is proposed to examine them, and, if not then made, will be deemed to have been waived.
2. **Fraudulent Conveyance: RIGHTS OF CREDITORS.** A conveyance from the husband to the wife, without consideration, is a fraud upon the creditors of the husband even in the absence of an actual fraudulent intention, and this is especially true when the conveyance leaves the husband insolvent.

Appeal from Benton District Court.

WEDNESDAY, DECEMBER 13.

It is alleged in the petition that plaintiff recovered two judgments against the defendant, John H. Riskamire, one in October, 1874, and the other in April, 1875, and that the whole of the first judgment, and a part of the second is unpaid; that said defendant was and for a long time had been the owner in fee of 80 acres of land in Benton county, and on the 17th day of September, 1874, he conveyed said land to his co-defendant, Sarah J. Riskamire, who is, and then was, his wife; that said conveyance was voluntary, and made for the purpose of hindering, cheating, delaying, and defrauding the creditors of said John H. Riskamire, who is insolvent, and

Watson v. Riskamire.

has no other property. It is asked that said conveyance be declared fraudulent, and that said land be subjected to the payment of said judgments. Defendants answer, alleging a want of knowledge sufficient to form a belief as to the judgments, and that the said conveyance was made in good faith for a valuable consideration, which was paid.

There was a decree for plaintiff, and defendants appeal.

Bishop & Bishop, for appellants.

St. Clair & Nichols, for appellee.

ROTHROCK, J.—I. The plaintiff took the depositions of the defendants to sustain the issues on his part, and at the close of the examination of each of said parties, the husband and wife : practice. defendants excepted to said depositions because said witnesses were called, sworn, and testified, at the instance of the plaintiff and against each other. The same objection was made in the form of a motion to suppress the depositions, which was overruled by the court, and defendants excepted.

Chapter 33, Laws of 1874, provides that “neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed by the one against the other, etc.” Under this act the defendants in this case are not competent witnesses as against each other. It is not a question as to the competency or admissibility of their testimony, but the objection lies to them as witnesses.

We believe, however, that the objection should be made to the competency of a witness when he is sworn, or at the latest, when it is proposed to examine him as a witness, and if no objection be interposed until after the close of the examination the objection should be held to have been waived.

II. The evidence shows that the conveyance in question was made and placed upon record by the husband without the knowledge of the wife. At the time of the conveyance both parties had full knowledge of the creditors. second judgment of plaintiff, and also that the husband had no other property.

Watson v. Ruskamire.

The alleged consideration was certain personal property consisting of horses, cows, sheep, a harness and wagon, and some household furniture which the husband received from the wife's guardian, in 1847 and 1849. There was no agreement that he was buying the property of his wife, but it was agreed he was to take it and handle it as his own, and pay her interest on it. We do not think that this created such an obligation on the husband in favor of the wife as to make a valid consideration for a conveyance, as against the creditors of the husband. When the conveyance from the husband to the wife is without consideration it is a fraud upon the creditors of the husband, and it is not necessary to show an actual fraudulent intention. Especially is this true when the conveyance leaves the husband insolvent and without means or property to pay his debts. Kerr on Fraud and Mistake, p. 196, *et seq.*

It is urged that the debt of plaintiff was amply secured by a mortgage upon other property, and that, therefore, the conveyance was not fraudulent as to plaintiff.

But it appears that the mortgaged property was exhausted, and that the plaintiff is now seeking the collection of the balance due him. This rebuts the idea that plaintiff's debt was amply secured, and that the husband had ample means to pay his debts aside from the land now in controversy.

III. The record before us does not show when the debt upon which the judgment rendered in October, 1874, was contracted. The conveyance of the land from the husband to the wife was made in September, 1874. Counsel for defendants urge that the evidence does not show that the plaintiff was an existing creditor, as to this judgment, at the time of the conveyance. This is correct, and as there is no such showing made as in our judgment would render this conveyance void as to subsequent creditors, the decree of the court below will be modified so as to hold the conveyance void only as to the balance due on the judgment on the debt which was secured by mortgage.

The plaintiff may at his option have his decree entered in this court, or the cause will be remanded to the court below for that purpose.

MODIFIED AND AFFIRMED.

The State v. Bernard.

THE STATE v. BERNARD.

1. **Evidence: TESTIMONY OF WIFE: CRIMINAL LAW.** The testimony of a wife in behalf of her husband in a criminal case is to be received, and her credibility is to be tested by the same rules which apply to all other witnesses, and it is error to instruct the jury that her testimony should be examined with peculiar care.

Appeal from Buchanan District Court.

WEDNESDAY, DECEMBER 13.

THE defendant was indicted and convicted of grand larceny, and sentenced to the penitentiary for two years and four months. From this judgment he now prosecutes his appeal.

Bruckart & Ney and Jamison & Begun, for appellant.

M. E. Cutts, Attorney General, for the State.

BECK, J. Upon the trial of the cause in the court below, the wife of defendant testified to material facts in his behalf. The court gave the following instruction to guide the jury in the consideration of her evidence:

“4th. The laws of Iowa permit the wife to testify for her husband in a criminal case, but her peculiar relations to her husband render it incumbent on the jury to examine her testimony with peculiar care, and if, from the testimony, they are satisfied that what she said is true, they should give her testimony the credit of any other witness. But if, from the testimony, taken together with that of other creditable witnesses or witness, the jury are satisfied that what she said is false, or that she was mistaken, then the jury are at liberty to reject it altogether.”

This instruction is almost an exact copy of the one held erroneous in the *State v. Rankin*, 8 Iowa, 355. The language of the two and the effect to be given thereto are substantially the same. The instruction given in this case must, upon the authority of that decision, be held erroneous.

The rule announced in the *State v. Rankin*, which follows

Wärren v. Hayzlett.

The State v. Guyer, 6 Iowa, 263, is that the testimony of a wife in behalf of her husband is to be received, and her credibility to be tested by the same rules which apply to all other witnesses. Her credibility, of course, is to be considered and weighed in view of her peculiar relation to the person on trial. But *peculiar care* is not to be exercised in weighing her testimony. That degree of high care which the law and the consciences of the jury require to be exercised in considering the evidence of all witnesses, should be applied to her testimony, and no other or different. There is no *peculiar care* to be brought into exercise when her evidence is weighed.

The instruction clearly tended to impair the wife's credibility in the minds of the jury, by leading them in search of tests and rules to be applied to her evidence in order to determine her credibility, which are unknown to the law and not recognized by sound reason. It was, therefore, prejudicial to defendant.

Other points in the case raised by the defendant need not be considered, as the judgment for the error pointed out must be

REVERSED.

WARREN v. HAYZLETT.

1. **Partnership: MORTGAGE.** Where property belonging to a firm is mortgaged to secure a note executed in the firm name, a partner has a right to insist upon a foreclosure of the mortgage before a personal judgment can be rendered against him upon the note.
2. _____: _____: **PRIORITY OF LIEN.** In case the party shall pay the note executed by the firm he then becomes subrogated to the rights of the mortgagee and his lien will be prior to that of a mortgage executed upon the same property by a grantee of the firm.

Appeal from Linn District Court.

THURSDAY, DECEMBER 14.

ACTION at law in which plaintiff seeks to recover the sum of \$860, on seven promissory notes. The defendant answered,

Warren v. Hayzlett.

admitting the execution of the notes but averring they were executed by Hayzlett & Clark, of which firm he was a member; that at the time said notes were executed said firm gave the payee therein, one Bargelt, a mortgage on certain real estate described in petition, to secure the payment of said notes, which mortgage was duly filed for record on the 7th day of May, 1857; that afterward, in March, 1870, in consideration of his agreement to pay said notes and mortgage, said firm sold and conveyed said premises to William Hayzlett, and that said William is insolvent; that on the 21st day of March, 1870, said William Hayzlett executed to David Brenizer a mortgage on said premises to secure the payment of \$1,600, and in February, 1873, executed another mortgage on said premises to C. B. Bradshaw to secure the payment of the sum of \$2,500.

This last mortgage was sold and assigned to plaintiff as cashier of a bank at Tama City, for the use and benefit of the bank; that in 1874, the Brenizer mortgage was foreclosed, the premises sold thereunder to Brenizer for \$2,100, who received a certificate of purchase; that afterward plaintiff, as cashier of said bank, paid said Brenizer the amount due him and took an assignment of the certificate of purchase; that the property is worth ten thousand dollars.

Defendant asks to be discharged, and that in case judgment should be rendered against him that he be subrogated to all the rights of Bargelt, and that his lien be declared paramount to the liens of the plaintiff for said bank.

There was a trial to the court, a finding of facts made and judgment dismissing the petition.

Preston & Son and W. H. Stivers, for appellant.

Thompson & Davis, for appellee.

SEEVERS, CH. J.—The court made the following findings of fact:

“In this cause I have found the facts to be: *First.* On and prior to the 24th day of April, 1867, for a long time one

Warren v. Hayzlett.

Edmund S. Bargelt was the owner in fee of the land in the defendant's answer described.

"Second. That, on or about the day and year last aforesaid, the said Edmund sold and conveyed said real estate to a firm in Mt. Vernon, Linn county, Iowa, then known by the name of Hayzlett & Clark, and that this defendant was the Hayzlett mentioned in said firm as a partner thereof.

"Third. That said Hayzlett & Clark executed and delivered to said Edmund S. Bargelt their seven several promissory notes of \$100 each, as the consideration for said land, and at the same time executed and delivered a mortgage to said Bargelt as security therefor, and that said seven promissory notes are the identical notes on which this suit is brought.

"Fourth. That afterward the said Hayzlett & Clark sold and conveyed said land to one Wm. Hayzlett for the sum of \$700, which he agreed with Hayzlett & Clark to pay, by paying and extinguishing the notes, with interest thereon, executed to said Bargelt, as aforesaid.

"Fifth. That afterward the said William Hayzlett put permanent improvements on said lots to the value of \$3,000, or thereabouts, and said lots with improvements are now of the value of about \$8,000.

"Sixth. That thereafter the said William Hayzlett executed and delivered to one David Brenizer a mortgage on said lot, on the 21st day of March, 1870, to secure the sum of \$1,600 to said Brenizer.

"Seventh. That thereafter, on the 15th day of February, 1873, said Hayzlett and wife executed a mortgage on said premises to C. B. Bradshaw to secure the payment of \$2,500.

"Eighth. That each and every one of the foregoing mortgages were duly filed for record in the recorder's office of Linn county, in the order of their execution, the last one to Bradshaw on the 27th of February, 1873.

"Ninth. That at the October term, 1874, of the District Court of Linn county, the mortgage to Brenizer was foreclosed, and a judgment and decree rendered, and thereafter in the month of November, 1874, the sheriff of said county, by virtue of a special execution issued on said judgments, sold

Warren v. Hayzlett.

said property to Brenizer for \$2,100 and executed a certificate of purchase.

"Tenth. That on or about September 1st, 1875, the plaintiff in this action purchased from said Brenizer said certificate of sale, or as a junior incumbrancer of said property by virtue of having purchased the Bradshaw mortgage of \$2,500, redeemed from said sale to Brenizer, and received from the sheriff of Linn county a deed for said property at the expiration of one year from the day of sale.

"Eleventh. That after said sheriff's sale, and after the assignment of said sheriff's certificate of sale to plaintiff by Brenizer, the plaintiff became the owner and holder of the notes executed by Hayzlett & Clark to Edmund S. Bargelt by assignment from Bargelt, and he is now the holder thereof, and has brought this suit thereon.

"Twelfth. That, before he received the assignment of said certificate of sale from Brenizer and notes from Bargelt, the plaintiff became by assignment from C. B. Bradshaw the legal holder of the mortgage executed by William Hayzlett to Bradshaw as aforesaid.

"Thirteenth. That said plaintiff holds all of said notes and mortgages and the legal title to said lands in his own name, but in fact as trustee of and for a bank in Tama City, Iowa, of which he is and was an employe."

The notes sued on were executed by the firm of Hayzlett & Clark, and they executed a mortgage on partnership property ^{1. PARTNER-SHIP: mort-gage.} to secure the indebtedness. Under the facts found by the court, the defendant has the right to have the firm property applied to the payment of partnership indebtedness.

If Bargelt had brought suit on the notes, the defendant could, by cross-petition, have set up the facts and compelled a foreclosure of the mortgage, either for the benefit of Bargelt or himself, and he would have been entitled to be subrogated to all the rights of Bargelt in case he was compelled to pay the indebtedness.

The plaintiff has no better or superior rights than Bargelt,

Becker v. Becker.

and as the plaintiff is the holder of the legal title obtained ~~2~~ ____: ____ through a sale under one of the junior incum-
~~priority of~~ brances, the defendant has the right to have the mortgage foreclosed and the premises sold, or be subrogated to the rights of the plaintiff in case he pays the indebtedness.

The mortgage executed by Haylett & Clark constitutes the superior lien on the premises, and the legal title held by plaintiff and the lien of the Bradshaw mortgage held by him is junior thereto.

The plaintiff is the holder of both the legal title and the Bargelt mortgage. If it under any possible view could be to the interest of the plaintiff to enforce the payment of the mortgage by a foreclosure and sale of the mortgage premises, we incline to think he could insist on having it done. But as the mortgage debt does not exceed at most twelve hundred dollars, and the property is of the value of eight thousand dollars, we are clearly of the opinion that it is not to the interest of the plaintiff to have a foreclosure and sale. In the event only that the premises should not bring at a sale an amount sufficient to satisfy the mortgage, would it be to the interest of the plaintiff to have a foreclosure and sale, and it is not at all probable such a thing could happen.

The judgment of the District Court must be

AFFIRMED.

45	220
80	550
45	220
51	229

BECKER v. BECKER ET AL.

1. **Evidence: INSTRUCTION.** Evidence admitted without objection cannot be excluded from the consideration of the jury by instructions.

Appeal from Howard Circuit Court.

THURSDAY, OCTOBER 14.

REPLEVIN for a team of horses. The plaintiff claims title to the property as widow of William H. Becker, deceased, who, as she alleges, owned it at the time of his death exempt from debt. The administrator of the estate set apart the prop-

Becker v. Becker.

erty to plaintiff. The defendants, in a joint answer, allege that at the death of William H. Becker the title of the team was in defendant, John Becker, who afterward transferred it to defendant, Salmon, now the owner of the property. There was a verdict and judgment for plaintiff; defendants appeal. The facts of the case material to an understanding of the points ruled by the court appear in the opinion.

H. T. Reed, for appellants.

H. C. McCarty, for appellee.

BECK, J.—The plaintiff testified that her husband, more than three years prior to his death, bought one of the horses in controversy of defendant, Becker, giving in payment a town lot. The wife of defendant, Salmon, was introduced as a witness for defendants, and was permitted to testify, without objection on the part of plaintiff, to conversations had with deceased in regard to the transaction involved in the action. No steps were taken to exclude her evidence before the cause was submitted to the jury. But by an instruction the court directed the jury that her testimony was not to be considered by them, except so far as the conversations testified to were found to be the same referred to in the evidence of plaintiff. This instruction appears to have been the first ruling by the court upon the competency of the evidence given by the witness. As we have said, no objection thereto had been before made by plaintiff. The evidence, having been received and gone to the jury without objection, was not properly excluded by an instruction. By the admission of the evidence without objection, the defendants were authorized to believe that the jury would have been permitted to consider it, and thereby would have been induced to rest upon it without offering other proof on the same point, if they possessed it. This court has held that objections to evidence cannot be raised by instructions to the jury. *State v. Pratt*, 20 Iowa, 267. The instruction was, therefore, erroneous in excluding from the consideration of the jury evidence admitted at the trial without objection.

Johns v. Bailey.

In this view of the case it becomes unimportant to inquire whether the evidence excluded by the instructions was incompetent under the rules of the law and should have been excluded if timely objection had been made thereto. The error of the court was in excluding it after it had been admitted without objection, and after the cause had been submitted to the jury.

Other questions in the cause need not be considered, as, for the error pointed out, the judgment of the Circuit Court must be

REVERSED.

JOHNS v. BAILEY ET AL.

1. **Contract: WHEN MADE ON SUNDAY: TRANSFEREE NOT PREJUDICED.** A written contract made on Sunday, but bearing the date of another day of the week, may be transferred, and will be enforced in the hands of a transferee in good faith and without notice.
2. **Pleading: DEMURRER.** A failure to demur will not deprive the appellant of the right to urge a legal objection to the judgment, when the fact upon which the objection was based was not pleaded.

45 241
139 707
1139 708

Appeal from Grundy Circuit Court.

THURSDAY, DECEMBER 14.

PLAINTIFF brought this action at law, seeking to recover a tract of land described in his petition upon the claim of holding the fee simple title thereto. The defendants deny plaintiff's right to the land, and, in their answer, show that he had sold it to Mary Skeels and executed a writing witnessing the sale and obligating him to convey the land to her; that possession of the land was taken under this contract by Mary Skeels and valuable improvements made thereon, and, afterward, she sold and transferred all her right and interest under the contract to defendants. The contract of sale and assignment thereof are as follows:

"Know all men by these presents: That I, Henry Johns, of Grundy county, Iowa, have this day bargained and sold

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Johns v. Bailey.

unto Mary Skeels, of Grundy county, Iowa, the north-west $\frac{1}{4}$ of the south-east $\frac{1}{4}$ of section 32, township 88, range 17. The said Henry Johns holds said premises by virtue of a tax deed, and it is the tax title that is intended to be sold to said Mary Skeels.

"It is agreed that said Mary Skeels is to pay all taxes after this date. The price agreed upon for the purchase of said tax title is as follows: The said Mary Skeels is to deliver five hundred bushels of good wheat at the residence of Henry Johns, in Shiloh township, Grundy county, Iowa. One hundred bushels of wheat yearly, until said five hundred bushels is delivered.

"Now, if said wheat is delivered as agreed, and the taxes are paid as agreed, then Henry Johns will make and deliver to said Mary Skeels a quit claim deed of said premises unto Mary Skeels.

HENRY JOHNS."

"December 21, 1874.

"COLFAX, GRUNDY COUNTY, IOWA, May 20, 1875.

"For and in consideration of one hundred dollars to me in hand paid by Bailey & Strevell, of Stephenson county, Ill., the receipt of which is hereby acknowledged, I hereby sell, transfer and set over to said Bailey & Strevell all my right, title and interest to the within contract. Also, all the improvements thereon, including house, stable, and all other improvements.

MARY SKEELS,
CHAS. SKEELS."

"Witness:

"JAS. RAYMOND."

It is further alleged in the answer that defendant entered upon the land under the transfer from Mary Skeels, which was for value. They make their answer a cross-petition, and ask that the cause be transferred to the equity side of the court, and that they be adjudged to hold rightful possession of the property, etc.

In reply to this answer plaintiff sets up that the contract under which defendants claim the land, as assignees of Mary Skeels, was executed and delivered upon Sunday, and never ratified by him, and is, therefore, of no effect.

Johns v. Bailey.

Upon a trial on the merits, a decree was entered for plaintiff, confirming his title and awarding him possession of the land. Defendants appeal. Other facts of the case necessary to an understanding of the decision of the court appear in the opinion.

Huff & Reed, for appellants.

William V. Allen, for appellee.

BECK, J.—I. The decision of this cause turns wholly upon the sufficiency of the contract of sale and obligation to convey

1. CONTRACT: the land, executed by plaintiff. There is no dis-
when made: pute as to the title held by him, and the sufficiency
transferree: of the assignment by Mary Skeels to transfer her
not preju-
diced. interest and right to defendants is not questioned.

We are requested to do nothing more than to determine whether the contract of plaintiff in the hands of defendants can be enforced.

The evidence conclusively shows that Mary Skeels and her husband took and held possession of the land under the contract, and that the instrument was executed and delivered on Sunday. It bears date, however, of another day. The defendants, about five months after the execution of the contract, purchased Mrs. Skeels' interest in the land, paying her a sufficient consideration, and immediately entered into possession of the land. They had no notice of the fact that the contract was made on Sunday.

We are to determine whether, under these facts, defendants acquired the interest in and the right to the lands which the instrument in question purports to transfer.

It has been repeatedly held by this court that a contract executed on Sunday, as between the parties, is of no effect and will not be enforced by the courts of this State. The decisions are based upon the principle that contracts in violation of law are without binding force; the parties thereto, being *in delicto*, can claim no rights under them. Secular employment is forbidden on Sunday by the laws of this State; contracts, therefore, cannot be entered into on that day without a violation

Johns v. Bailey.

of law, and cannot be enforced. The ground of the principle upon which such a contract is pronounced invalid is the violation of the law by the parties thereto. It is *causa turpis*. The parties to the contract are *participes criminis*, and are *in pari delicto*; neither can enforce the contract, for both are violators of the law.

A contract made on Sunday is not a nullity. If for labor which is performed on another day by one party, the other cannot set up its turpitude to defeat an action thereon against him. *Mernwith v. Smith*, 44 Geo., 541. It is not wholly inoperative, for when executed no relief will be granted to either party. *Myers v. Merwrath*, 101 Mass., 366. When such a contract is spoken of as being void, the language is understood to mean voidable, that is, it may be defeated, cannot be enforced by action. See *Pike v. King*, 16 Iowa, 49; *Adams v. Gay*, 19 Vt., 358.

We know of no reason why a written contract made on Sunday may not be transferred by proper writing. Surely, such a transfer would be valid between the parties thereto. If the contract is not a nullity, it may be transferred. When transferred, what are the rights of the parties? If the assignee took no part in the inception of the contract, and had no notice of its turpitude, he did not violate the law forbidding the execution of the instrument. He is not *participes criminis* with the obligor.

The rule, *ex turpi causa non oritur actio*, will not avail to protect a wrong-doer against an innocent party whose rights have been acquired without notice of the violation of law. *Quick v. Thomas*, 6 Mich., 76. The courts will afford relief where parties to an illegal contract are not *in pari delicto*. *Schermerhorn v. Talman*, 14 N. Y., 93; *Tracy v. Talmage*, Id., 162; *Quick v. Thomas*, *supra*.

In order to defeat a contract made on Sunday, it must be shown that the party seeking to enforce it had some voluntary agency in consummating the contract on that day. *Sargeant v. Butts*, 21 Vt., 99.

II. In the case before us the plaintiff caused the contract to be dated as though it had been executed on a secular day.

Johns v. Bailey.

By this act the defendants may have been misled and induced to believe that the defense now made to the contract did not, in fact, exist. While giving all the appearance of legality to his contract, plaintiff cannot set up its illegality to protect himself against the instrument when in the hands of a good faith holder without notice. He is estopped to deny the validity of the instrument when he by his own act has given it such character. See *Knox v. Clifford*, 38 Wis., 651; *Cranston v. Gross*, 107 Mass., 439, and authorities cited.

The foregoing views are not in conflict with any decision heretofore made by this court. They certainly accord with the rules of equity, and lead to a result approved by justice. Applying them to the case in hand, we hold that plaintiff cannot set up the execution of the contract on Sunday to defeat it in the hands of defendants, who are good faith purchasers for value and without notice of the illegality pleaded.

III. The plaintiff insists that, as defendants did not demur to his reply to their answer, they cannot now urge objection ^{2. PLEADING:} to the judgment on the ground that they are good demurrer. faith assignees of the contract without notice.

Without determining the effect of a failure to demur in a proper case, it is a sufficient answer to the objection to say that a demurrer to plaintiff's reply would not have raised the question involving the validity of the contract in the hands of defendants, which we have discussed, and upon which their rights depend. Defendants, therefore, could not have demurred to plaintiff's reply. This will plainly appear from a brief statement of the pleadings. The petition claims to recover upon the legal title held by plaintiff; the answer sets up the contract and thereon claims that the equitable title is in defendants; the reply alleges simply that the contract was made on Sunday and was never ratified by plaintiff, and denies the allegations of the answer. A demurrer to the reply would have admitted the facts pleaded therein and no other. The assignment to defendants of the contract for value, and without notice, was not set up in the reply, but was denied therein. It would not have been taken as admitted by the court, in passing upon this demurrer, for the court would not

Weane v. The K. & D. M. R. Co.

have looked to prior or subsequent pleadings for facts admitted, nor considered facts not pleaded or admitted, in rendering judgment on the demurrer. The facts alleged by the reply only would have stood as admitted. These did not include the assignment of the contract in good faith and for value and without notice, the very gist of defendants' case.

IV. The action was commenced before the time fixed for payment by the contract. Defendants do not ask that the contract be specifically enforced by a decree requiring plaintiff to execute a deed for the land. The relief they ask is that they may be secured in the possession of the land which they acquired and held under the contract. To this relief they are entitled. Their right to a conveyance of the land will depend upon their performance of the contract in making the payments stipulated therein.

A decree will, at the option of defendants, be entered in this court dismissing plaintiff's petition and granting the relief prayed for by defendants in their answer, and declaring the contract under which they claim valid and binding in their hands, or the cause will be remanded to the Circuit Court that such a decree may be there entered.

REVERSED.

WEANE v. THE K. & D. M. R. Co.

1. **Evidence: EXPERT TESTIMONY.** Whether in a given case a shaded object would be rendered visible by artificial light shining from a certain specified point is not a question of technical knowledge or trained observation, but is rather a matter of judgment based upon common observation and a knowledge of the reflecting surfaces in the particular case, and is not, therefore, a proper subject for expert testimony.

Appeal from Marion Circuit Court.

THURSDAY, DECEMBER 14.

ACTION to recover for personal injuries. On the 21st day of October, 1874, at about eleven o'clock at night, one of the

Weane v. The K. & D. M. R. Co.

defendant's freight trains ran off of the track at Comstock Station and was wrecked. The accident was caused by the switch being thrown back and locked on the side track, whereby a break was left in the main line. The plaintiff, who was employed upon the train as fireman, received severe injuries. Trial by jury. Verdict for plaintiff. Defendant appeals.

Gillmore & Anderson and Stone & Ayres, for appellant.

Curtis & Gesman and Miller & Sons, for appellee.

ADAMS, J.—The evidence showed that the night was dark and misty. The defendant upon the trial introduced witness^{1. EVIDENCE:} who testified in substance that, a short time before the accident, they saw the station agent at the switch with a lantern in his hand, and saw him set up the switch and lock it and leave it in its proper condition. To rebut this evidence the plaintiff introduced as a witness one Tully, an experienced railroad man, and asked him the following question: "Suppose there was a man standing by the side of the switch that night and holding a lantern such as you have described in his hand a foot or two from the ground, how far away from the target could a man see the top of the target, or any part of the target above the lantern?" To this question the defendant objected as incompetent, irrelevant and immaterial. The court overruled the objection, and the witness answered: "He could not see the top of the target if he stood right along side of it. He could see the target post as far as the light shone and no farther."

In admitting this testimony, we think that the court erred. The subject was not a proper one for expert testimony. Of course if no direct light from the lantern shone upon the target, and no light from the lantern was reflected upon it, it could not be seen by reason of the lantern. Indeed, if the lantern was between the target and the spectator, it might have served to render the target invisible. At the same time it is certain that some light must have been reflected upon it, if there were any objects illuminated by the lantern and visible from the target. The reflected light might have been

The State v. Mizner.

very small. It might have been insufficient to render the target visible. Whether it would have that effect or not would depend upon the character and proximity of the reflecting objects. As to the tendency, there is no question. Everybody knows that the light from a burning building in the night will render many an object visible upon which the light does not shine directly. A room may be very considerably illuminated by a lamp so placed as not to shine directly into it. The light from a lantern differs from that of a burning building only in degree. Whether in either case a shaded object would be rendered visible by the light is not a question of science, or technical knowledge, or trained observation. It is a question of ordinary judgment, based upon common observation, and a knowledge of the reflecting surfaces in the particular case.

REVERSED.

SEEVERS, CH. J., having been of counsel in this case, took no part in its determination.

THE STATE v. MIZNER.

1. Schools: SCHOLARS OVER THE SCHOOL AGE. If a person who has attained his majority of twenty-one years voluntarily attends school, creating the relation of teacher and pupil, he thereby waives any privilege which his age confers and subjects himself to like discipline with those who are within the school age.
2. _____: _____: PUNISHMENT. Such scholar may be punished for refractory conduct, and the teacher may escape liability therefor upon proof that the chastisement was under the circumstances reasonable.

Appeal from Allamakee District Court.

THURSDAY, DECEMBER 14.

THE defendant was tried before a justice of the peace, upon an information charging him with the crime of assault and battery, and was convicted. He appealed to the District

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Court, where the cause was tried before a jury, and he was again convicted.

The defendant was fined in the sum of ten dollars, and judgment was entered against him therefor, and for the costs of the prosecution. Defendant appeals.

Stilwell & Baker and *A. M. May*, for appellant.

M. E. Cutts, Attorney General, for the State.

DAY, J.—The prosecuting witness, Ida Brumer, in substance testified that the defendant taught a district school in Rossville, and that she commenced attending his school in the forepart of November, 1874. That, on the 22nd day of December, 1874, whilst she was a pupil in defendant's school, defendant whipped her, in a manner which, from her testimony, appears to be unreasonable and immoderate. She further testified that, at the time she commenced going to school, which was about the 10th day of November, she told the defendant she was twenty years of age, and that, in fact, she was twenty-one years of age on the 25th day of that month.

No testimony was introduced on the part of the State but that of the prosecuting witness. The State having rested, the defendant made the following admissions and offer, to-wit: "It is hereby conceded by the defendant that he whipped Ida Brumer, at the time and place alleged in the information, and that he is guilty of an assault and battery, unless he can show, as he offers to do, that such whipping was reasonable chastisement of said Ida Brumer, in the school, as his pupil, for misconduct in school. Defendant further concedes that said Ida Brumer, at the time of such whipping, had attained her majority." Thereupon the court refused to allow the defendant to prove that the alleged whipping was reasonable chastisement of said Ida Brumer in school, as his pupil, for misconduct in school, holding that, as it was conceded that Ida Brumer had attained her majority at the time of the whipping, the facts which the defendant offered to prove constituted no defense. To this ruling the

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defendant excepted. No further evidence being introduced, the court instructed the jury as follows: "If you find from the evidence that the defendant committed an assault and battery upon the prosecutrix, and you further find from the evidence that at the time of the assault the prosecutrix had attained the age of twenty-one years, you are instructed that the defendant had not the lawful right to make the assault and battery as a punishment for disobedience of the orders of the teacher or of the rules of the school." The defendant excepted to this instruction.

The court seems to have recognized the general doctrine that a teacher may, for the maintenance of his authority and the enforcement of discipline, legally inflict reasonable chastisement upon a pupil. Whilst the authorities upon the subject are not numerous, there can, it seems to us, be no doubt of the existence of this right. In 3 Greenleaf on Evidence, section 63, it is said the criminality of a charge of assault and battery may be disproved by evidence showing that the act was lawful; as, if a parent in a reasonable manner corrects his child, or a school master his scholar. See *Landers v. Seaver* 32 Verm., 114; *Commonwealth v. Randall*, 4 Gray, 36.

The court denied the right of the defendant in this case to inflict corporal punishment to any extent upon the prosecuting witness, because she was twenty-one years of
1. SCHOOLS: scholars over the school age. A parent may lawfully correct his child, age. being under age, in a reasonable manner. 1 Blackstone, 452; 2 Kent's Commentaries, 203. If the court intended to deny the right of the defendant to chastise the prosecuting witness because the same limitation is imposed upon a teacher as upon a parent, the right to inflict corporal punishment should, in this case, have been denied upon reaching the age of eighteen, for then the prosecuting witness attained her majority. Code, 2237. Schools are provided for the instruction of youth between the ages of five and twenty-one years. Code, section 1727. If the right of a teacher to inflict corporal punishment is correlative simply with the right of a parent, it follows that in every school there may be a privileged class of young ladies, between the ages of eighteen and

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twenty-one years, entitled to all the privileges of the school, but not subject to the same discipline and authority as the other pupils. It is quite apparent that such a condition of things might destroy the authority of the teacher and be utterly subversive of good order. But, as the court fixed the age of twenty-one years, it is probable that he had in view, not any analogy between teacher and parent, but the ages of those who might lawfully attend school. Only youth between the ages of five and twenty-one years are, of right, entitled to attend the public schools.

But, if a child a few months younger than five years should, by misrepresenting his age, or by mere sufferance, be allowed to attend school and enjoy its privileges and advantages, would a teacher be liable to a prosecution for assault and battery, if he should inflict reasonable and moderate chastisement upon such pupil for conduct tending to destroy the order of the school and lessen the means of imparting instruction to others? Manifestly, it seems to us, he would not. And, if a person a few months more than twenty-one years of age should, by the like sufferance or misrepresentation, be allowed to become a pupil in a school, upon what principle could such person claim all the privileges and advantages which belong only to persons under the age of twenty-one years, and at the same time be granted immunity from the reasonable corporal inflictions which may legally be imposed upon a person under twenty-one years of age? A person over twenty-one years of age becomes a pupil only of his own voluntary act. If he does so, and thus of his own will creates the relation of teacher and pupil, and claims privileges and advantages belonging only to those under age, he thereby waives any privilege which his age confers. These views are fully sustained by the case of *Stevens v. Fassett*, 27 Maine, 266. In this case, on page 287, the court say: "But it is insisted that, if such is the authority of the teacher over one who is in legal contemplation a scholar, the same cannot apply to the case of one who has no right to attend the school as a pupil. It is not necessary to settle the question whether one living in the district and not being between the ages of four

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and twenty-one years can, with propriety, require the instruction of town schools. If such does present himself as a pupil, is received and instructed by the master, he cannot claim the privilege, and receive it, and at the same time be subject to none of the duties incident to a scholar. If disobedient, he is not exempt from the liability to punishment, so long as he is treated as having the character which he assumes. He cannot plead his own voluntary act, and insist that it is illegal, as an excuse for creating disturbances, and escape consequences which would attach to him either as a refractory, incorrigible scholar, or as one who persists in interrupting the ordinary business of the school."

The prosecuting witness in this case, although within fifteen days of being twenty-one years old, told the defendant that ~~she was~~: she was twenty years of age. This could have been done for no other purpose but that of deceiving the defendant as to her age, and securing privileges and advantages to which the law did not entitle her. She voluntarily assumed the position of pupil, claimed its rights, and took upon herself its duties, and she thereby conferred upon her teacher his correlative rights and duties. The court should have permitted the defendant to prove that the whipping was a reasonable chastisement of the prosecuting witness, as his pupil, for misconduct in school, and should have left it to the jury to determine whether or not the whipping was, under all the circumstances, reasonable.

In rejecting the testimony offered, and in giving the instruction complained of, the court erred.

REVERSED.

Richards v. Hintrager.

RICHARDS ET AL. V. HINTRAGER.

1. Practice in the Supreme Court: TRIAL DE NOVO. To entitle a party to trial *de novo* in the Supreme Court, he must move upon the trial in the court below that all the evidence be taken down in writing.
2. ——: ——: CONSTITUTIONAL LAW. While the right to a trial *de novo* cannot be taken away by legislative action, yet it is competent for the legislature to regulate the manner in which the right shall be exercised.
3. ——: ——: BILL OF EXCEPTIONS. Where the evidence is not preserved by bill of exceptions, and no exceptions to the judgment are taken, in a case not triable *de novo* in the Supreme Court, there is nothing presented upon which the court can review the decision of the court below, or determine that the appellee is not entitled to the relief granted.

Appeal from Dubuque District Court.

THURSDAY, DECEMBER 14.

This is an equitable proceeding in which the plaintiffs seek to set aside a certain tax sale of their real property, and to have the deeds made in pursuance of such sale declared void, because of the existence of certain matters stated in the petition. The answer admitted certain allegations in the petition, denied others, and alleged certain facts in avoidance of others.

The District Court found for the plaintiffs and rendered judgment accordingly. Defendant appeals.

E. McCeney, for appellant.

D. C. Cram, for appellee.

SEEVERS, CH. J.—I. It is apparent from the abstract that this cause was tried below upon oral testimony taken in open court as contemplated in § 2741 of the Code. No motion was made, as provided in § 2742 of the Code, for a trial upon written evidence. Nor does it appear that the evidence was written down by the order or direction of the judge. The abstract, however, purports to set out all the evidence, and at the conclusion thereof states:

Richards v. Hintrager.

"This being all the evidence, the court on the 14th day of August, 1875, rendered the decree."

The appellee insists that under these circumstances there cannot be a trial *de novo* in this court, and such was the ruling in *Walker v. Plummer*, 41 Iowa, 697, which has been followed in several other cases since that decision.

It is insisted by appellant that inasmuch as a trial *de novo* in equity causes is guaranteed by the Constitution, any statute which destroys or takes away such right is unconstitutional. In so claiming the appellant is undoubtedly sustained by *Sherwood v. Sherwood*, 44 Iowa, 192.

But the right of appeal and trial anew is not taken away or destroyed, nor does the statute in any manner impair such ^{constitutional} right. While it is not competent to take away law. the right of trial *de novo* by statute, yet such right may be thereby regulated.

A party may be entirely willing to submit his cause to a court before whom the witnesses are examined orally upon a certain amount of testimony, but would be unwilling to so submit it if he knew there was to be a trial *de novo* in this court. Hence the necessity of the motion, or some other action in the court below equivalent thereto.

The theory of the statute is that the parties shall be advised at the appearance term whether a trial *de novo* will be insisted on in this court, in case there is an appeal, so they may prepare their testimony accordingly.

II. The evidence was not preserved by bill of exceptions, nor was there any finding of facts, motion for a new trial, or exception taken to the judgment, or any other ruling of the court below. Error, however, is assigned that "under the pleadings and evidence the plaintiffs were not entitled to the relief prayed for and given by the decree."

The appellee insists that such a record presents no question this court can try and determine.

As there can be no trial anew the defendant has the right to have any errors of law committed by the District Court which were duly excepted to and assigned as error determined. But the difficulty is, no exceptions were taken, and therefore

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there is nothing we can consider. This has been ruled so often, and is so well understood, that a citation of authorities is unnecessary.

Besides this, under the assignment of error nothing can be considered by us unless the cause has been placed in such a position as to enable us to review the finding and decision of the court on the facts as well as the law. *Dean v. White*, 5 Iowa, 266.

The judgment of the District Court is therefore

AFFIRMED.

45	255
78	17
78	20
45	255
91	360

CUSHMAN v. WASHINGTON COUNTY.

1. Services: PHYSICIAN: CORONER'S INQUEST. The coroner, or justice acting in his absence, is charged with the duty of fixing the compensation of a physician for performing autopsy upon the body of a deceased person under view, and his decision respecting the amount is in the nature of an adjudication, preventing the physician from maintaining an original action against the county for his services.

Appeal from Washington District Court.

THURSDAY, DECEMBER 14.

THIS action is based on the following account:

“WASHINGTON COUNTY, Dr.

“To H. CUSHMAN: 1875, May 4. To performing autopsy on the body of Julius Seely, by order of Anson Moore, justice of the peace and acting coroner, \$50.”

It is alleged in the petition that an inquest was held upon the body of Julius Seely, deceased, and in the absence of the coroner, the same was held by one Anson Moore, a justice of the peace; that said Moore summoned plaintiff, who is a regular practicing physician and surgeon, to make a *post mortem* examination on said body; that plaintiff made such examination, which was reasonably worth \$50; that he asked said justice to allow said sum of \$50, which was refused, and

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no allowance was made by said justice, excepting \$5 for witness fees and mileage for attending said investigation; that plaintiff presented said account to the board of supervisors, and allowance thereof was refused; that there was no property found on the body of the deceased with which to pay the costs of the inquest; that the widow, heirs and friends of deceased protested against such inquest and *post mortem* examination, and that said acting coroner directed and instructed plaintiff to proceed in the name of the State of Iowa.

There was a demurrer to the petition, which was sustained, and judgment rendered against plaintiff, and he appeals.

A. R. Dewey, for appellant.

A. H. Patterson & Son, for appellee.

ROTHROCK, J.—The Code, section 368, provides that, “in the above inquisition by a coroner, when he or the jury deem it requisite, he may summon one or more physicians or surgeons to make a scientific examination, and shall allow in such case a reasonable compensation, instead of witness fees.”

1. SERVICES: physician: coroner's inquest.

The coroner, or the justice acting in his absence, is the officer or tribunal exclusively charged with the duty of fixing the compensation in question. For refusal to act on the claim made, he may be compelled to do so by *mandamus*. For allowing an insufficient compensation, as no appeal is allowed, it is not clear what, if any, remedy is provided. The petition in this case shows that the justice refused to allow the claim for \$50, but did allow \$5 for witness fees and mileage for attending the investigation. This allowance is in excess of ordinary witness fees, and having been made and the same being in the nature of an adjudication still in force, the plaintiff cannot maintain an original action against the county for his compensation.

As this view of the case disposes of it on its merits it is not necessary to examine the other causes of demurrer.

AFFIRMED.

Butterfield v. Pollock.

BUTTERFIELD ET AL. V. POLLOCK ET AL.

1. **Highway: NOTICE: SUFFICIENCY OF.** A mistake in the notice and petition for the establishment of a highway, respecting the proposed location thereof, will defeat the jurisdiction of the board of supervisors to establish the highway, if the mistake be of such a character that a person would not readily discover it. In considering the sufficiency of the notice, extrinsic facts are not admissible to explain it.

Appeal from Clinton District Court.

THURSDAY, DECEMBER 14.

THE plaintiffs aver in their petition in substance that on the 8th day of December, 1873, an order was made by the county auditor establishing a certain county road, as follows, to-wit: Beginning 20 ch. w. of the ne. corner of section 31, thence 10 ch. to margin of slough, thence in a semi-circle on the n. margin of said slough until it intersects Davenport road, thence following said Davenport road until it intersects section line between sections 30 and 31, thence w. along n. side of said line 46 ch. and 50 lks. to a stake, thence n. 58° w. 4 ch., thence s. 56° w. crossing the creek back to said line, thence west until it intersects a road running north and south near a school-house; that on the 16th day of March, 1874, he directed the supervisor of the road district in which said road is situated to open said road as a public highway, and mark the same as such, as required by law; that said road, as established, passes through the premises of said plaintiffs, as appears marked on a plat of said road attached, marked "Exhibit A.;" that said road, as laid out and established, is illegal, and the proceedings had in the establishment of the same null and void, for the following reason:

That on the 2d day of June, 1873, a petition, signed by Lot G. Carr and others, was filed in the office of the said auditor asking the said auditor and the board of supervisors of said county to locate a road over the following route, to-wit:—Beginning at the southwest corner of section 30, in township 81 north, range 4 east of the 5th P. M., and running thence

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west on the section line of said section 30 about forty rods to the margin of the slough, and thence on the north margin of the slough in a semi-circle to intersect on said section line at or near the southeast corner of the southwest quarter of said section 30, and running from thence west on said section line and on the section line of section 25 in township 81 north, range 3 east of the 5th P. M., in a straight line east and west to a point intersecting a road running north and south at or near the southwest corner of the southeast quarter of said section 25; "said petition asking that a commissioner be appointed to view the proposed route. A copy of said petition is attached, marked "Exhibit B."

The plaintiffs further show in their petition that the notice of the presentation of the said petition for a road was in the following words:

"Notice is hereby given, that a petition will be presented to the Auditor of Clinton county, Iowa, on the 2d day of June, A. D. 1873, asking the said auditor and the board of supervisors of said county for the establishment of a road over the following route, to-wit: Beginning at the southwest corner of section 30, in township 81 north, range 4 east of the 5th P. M., and running thence west, on the section line of said section 30, about forty rods to the margin of the slough, and thence on the north margin of the slough in a semi-circle to intersect on said section line at or near the southeast corner of the southwest quarter of said section 30, and running from thence west on said section line and on the section line of section 25, in township 81 north, range 3 east of the 5th P. M., in a straight line east and west to a point intersecting a road running north and south at or near the southwest corner of the southeast quarter of said section 25.

L. G. CARR, Applicant."

The plaintiffs further show that a commissioner was appointed, and that he recommended that a road be established by description the same as that set out first above, and according to which the plaintiffs aver that the road was established.

They further show that the defendant, John Pollock, as

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county auditor, has directed the road to be opened, and they pray that a writ of *certiorari* be issued commanding the defendant to certify fully to this court a transcript of the records and proceedings in reference to the establishment of said road, and that said proceedings be annulled and held void and of no effect.

A writ of *certiorari* was issued, and the defendant made return thereon, setting out among other things the road petition and road notice.

The District Court held that the petition and notice failed to give a sufficient description of the proposed road; that the road therefore was illegally established, and that the action of the board of supervisors in establishing it was a nullity. Judgment for plaintiffs. Defendants appeal.

Kirke W. Wheeler, for appellant.

Merrill & Howat, for appellees.

ADAMS, J.—The road petition and road notice described the road as commencing at the southwest corner of section 30, and ^{1. HIGHWAY;} running thence west. The road as located com-
^{notice: sum-} mences near the southeast corner of section 30, and runs thence west. The word *southwest* was used where *southeast* was intended. This appears on the face of the petition and notice. But this does not become apparent without a more careful examination, we think, than any person ordinarily in reading the notice posted would give it. The question then is: Shall such a notice be regarded as sufficient to meet the requirements of the law? If a person upon reading the notice would not ordinarily discover the mistake and substitute the word *southeast* for *southwest* and thereby make out the true proposed location, then the notice did not fulfill the purpose of a notice, and must be treated as a nullity.

It may be that persons acquainted with the location of the slough, and with the topography of the neighborhood, would readily discover the mistake, but we cannot presume as a matter of law that the persons affected by the establishment of the road have such acquaintance. In considering the suf-

Washington County v. Jones.

ficiency of the notice we must look to that alone. We cannot regard it as helped out by extrinsic facts. It follows that the board of supervisors acquired no jurisdiction, and no road was established.

AFFIRMED.

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89 311
45 200
93 173

WASHINGTON COUNTY v. JONES.

1. **Practice: APPEARANCE: FAILURE TO MAKE.** A party is not excused for failure to make appearance before a referee to whom the cause has been referred, after being served with notice, by the fact that he or his attorneys have been induced to believe that no trial would take place at the time designated in the notice.
2. **— : TRIAL BEFORE REFEREE.** The report of a referee may be assailed by a motion to set it aside or by proper exceptions thereto, filed upon the coming in of the report, and it is not essential that exceptions be taken to errors occurring on the trial before him, if such errors appear of record.
3. **Clerk of the Court: COMPENSATION OF: PROBATE BUSINESS.** Prior to September 1, 1873, the Board of Supervisors was authorized to allow the clerk a reasonable compensation for services in probate matters, in addition to the fees then allowed him by law, but such compensation could not exceed the amount collected by him for probate business.
4. **— : — : HOW TO BE PAID.** The compensation of the clerk was limited to \$2,000 a year, but this was to be paid out of the fees of his office, and if they were less than that amount exclusive of the fees collected for probate business, his compensation was correspondingly less.
5. **— : — : LIMIT OF.** Under the Code his entire compensation for all official services is limited to \$2,000 per annum.
6. **— : — : DEPUTY.** He is entitled in addition, however, to such an allowance for the hire of a deputy as may be reasonable, in view of the amount of labor demanded by the duties of his office.

Appeal from Washington District Court.

THURSDAY, DECEMBER 14.

THIS action was commenced to recover an alleged balance of \$5,000 which it was claimed was due the plaintiff for the failure of defendant to pay over and account for certain money which came into his hands as clerk of the District and Circuit

Washington County v. Jones.

Courts. There was an answer and cross-demand filed by defendant, and there were substituted pleadings, and by consent of the parties the cause was referred and trial had before the referee, who made a report which was unsatisfactory to both parties. The court modified the report and rendered a judgment in favor of defendant for \$529.58, and both parties appeal.

The further facts necessary to an understanding of the case appear in the opinion.

Patterson & Rhinehart, for plaintiff.

McJunkin, Henderson & Jones and *H. & W. Scofield*, for defendant.

ROTHROCK, J.—I. After the order of reference was made, and on the 2d day of December, 1875, the defendant served a notice on the chairman of the Board of Super-visors that the case would be called for trial before the referee on the 16th day of the same month. The service of the notice was accepted in writing, and the chairman of the board informed plaintiff's attorneys that he had been so notified. On account of some conversation and negotiation between plaintiff's attorneys and defendant, said attorneys did not appear before the referee, and the cause was tried in their absence.

It was claimed in the court below, and is claimed here, that the report of the referee should be set aside, because the attorneys for the plaintiffs were misled by the statements of defendant, and made to believe that no trial would be had. There are a number of affidavits and counter affidavits on the question, which we need not discuss here.

It is sufficient to say that we think the attorneys of plaintiffs, and the chairman of the board, should have made an appearance for the county, notwithstanding all that it is claimed occurred between the parties.

II. The evidence which was introduced before the referee

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is not all before us, and we can only determine the questions 2. trial arising on the conclusions of law, accepting the facts found by the referee as true. This we will do without elaboration, and without a statement of the pleadings.

Defendant's counsel insist that plaintiff cannot be heard because no exceptions were taken before the referee. Exceptions are only necessary to make that of record which otherwise would not so appear. If the referee erred in his conclusions of law, advantage may be taken thereof by motion to set aside the report, or by proper exceptions thereto filed upon the coming in of the report.

III. The referee found that defendant was entitled to \$2,000 per year for six years services as clerk of the District and Circuit Courts, being from January, 1869, to January, 1875. For services in probate matters from January 1st, 1869, to September 1st, 1873, \$2,520, being at the rate of \$540 per year, and for deputy hire from September 1st, 1873, to January 4th, 1875, \$920.

It was found that defendant had received District and Circuit Court fees, \$8,926.09; probate fees, \$1,269; marriage licenses, \$1,263.75; and in county warrants, \$2,531.58. This statement of account left a balance due to defendant from the county amounting to \$1,449.58. The District Court deducted the item for deputy hire and rendered a judgment against the county for \$529.58. It was found as a fact that the probate fees actually received for the whole period were \$1,269. To make up the average of \$540 per year, the amount allowed for the probate business, the referee added the marriage license fees and probably the amount of probate fees uncollected.

We held in *Peet v. White*, 43 Iowa, 400, that fees earned and charged belong to the clerk who earns the fees without reference to the time they are collected. That case, however, was peculiar in its facts. The Board of Supervisors had fixed the amount of compensation to the clerk, including his deputies, at the amount of the whole of the fees of the office whatever they might be. In this case it appears, from the fact

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that the clerk received quite a large amount in county warrants, that the board based his compensation on the idea that he should not be allowed any fees which might be collected after the expiration of his term of office.

We think there was no error in allowing the defendant a reasonable compensation for his services in probate matters ^{3. CLERK of the court: compensation of: probate business.} up to September 1st, 1873. Chapter 134 of the Acts of 1868 provides that the clerk shall receive such compensation as the Board of Supervisors may allow, which shall be in addition to the fees and amount then allowed by law to said clerk. Before that, the total amount of compensation for all official services could not exceed \$2,000.

The transaction of the probate business was an additional burden put upon the clerk, for which it was the duty of the board to make a reasonable and fair compensation. But the act of 1868 also provided that such compensation should be paid out of the money collected by the clerk for probate business. It could not then, in this case, exceed the sum collected during the time it should be allowed. The amount collected was \$1,269 for the whole period of six years. How much was collected prior to September 1st, 1873, we are unable from the record before us to determine.

IV. The limit of a clerk's compensation prior to September 1st, 1873, was \$2,000, exclusive of the amount allowed by ^{4. — : —} the board of supervisors for probate business; but ^{how to be paid.} while it was limited to \$2,000, if the fees of the office did not amount to that sum exclusive of probate fees, the whole compensation might have been less than \$2,000. Section 432 of the Revision provided that the compensation should not exceed the sum of \$2,000 for all official services, and if the total amount of fees received in any one year should be deemed by the board as inadequate compensation for the services rendered, the board might allow such additional compensation as they might deem just.

This was not intended to enlarge the whole compensation beyond \$2,000. The provision allowing additional compensa-

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tion was only applicable in cases where the fees did not amount to \$2,000.

After the enactment of chapter 134 of the laws of 1868, the clerk was entitled to compensation for probate business in addition to the fees and amount then allowed by law. In counties where the fees of the office actually received during the year, excepting probate fees, amounted to more than \$2,000, the excess was required to be paid into the county treasury. The clerk in such case was absolutely entitled to receive the \$2,000 for his compensation, and an additional amount for services in probate matters which was to be fixed by the board. But in counties where the fees of the office, aside from the probate fees, did not amount to \$2,000, the compensation for probate business might be allowed, and yet the whole compensation be \$2,000 or less.

For example, if the ordinary fees received amounted to \$1,200, it was discretionary with the board, under Sec. 432 of the Revision, whether they would allow additional compensation for ordinary services. Suppose they should allow \$300 for such services, and then allow \$500 for the probate business, the whole compensation would be \$2,000, and the clerk could claim no more.

V. Section 3784 of the Code provides that the total amount of compensation of the clerk, *for all official services*, shall not exceed the sum of two thousand dollars in any limit of one year. Section 3783 provides that the board of supervisors may allow compensation for services in probate matters, to be paid out of the fees collected for probate business. But this section does not provide that this compensation "shall be in addition to the fees and amount now allowed by law," as is provided in chapter 134, laws of 1868. The total amount, then, which can be allowed a clerk for his personal services, since September 1st, 1873, is two thousand dollars per annum, and it may be less if the ordinary fees of the office do not amount to that sum.

VI. Section 433 of the Revision provided that the clerk should furnish at his own expense all necessary deputies. This section was not re-enacted in the Code. Section 417 of

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the Code of 1851 provided that "When a county officer receiving a salary is compelled by the pressure of the business of his office to employ a deputy, the county court may make a reasonable allowance to such deputy."

In *Bradley v. Jefferson County*, 4 G. Greene, 300, it was held that the county must pay a reasonable compensation for the necessary services rendered, and that such payment was not discretionary. That was a case where a county treasurer employed a deputy and paid him, and then made claim against the county for the amount paid, and it was held that he could recover.

Section 648 of the Revision and section 771 of the Code are the same in substance as section 417 of the Code of 1851. In our judgment, then, a clerk is entitled to such reasonable deputy hire as the pressure of the business of his office demands. It is proper to say that the question as to whether the treasurer was an officer "receiving a salary" was not determined in *Bradley v. Jefferson County, supra*; and whilst it is true that the clerk receives his compensation from the fees of his office, yet such compensation cannot exceed two thousand dollars, and the effect of the law is such as to leave it to be fixed by the board of supervisors within certain limits, and it is practically a salaried office.

VII. It is proper to observe that it appears from the cross-demand of defendant that before filing the same he presented it to the board of supervisors for allowance, which was refused.

No question is made in the argument of counsel as to the right of defendant to maintain the action upon his cross-demand. It is in the nature of an original action. Whether it can be prosecuted as an original action we do not determine, as the question is not before us.

VIII. We have thus given what we believe to be the true construction of the statutes fixing the compensation of clerks of the District and Circuit Courts. All the questions determined seem to arise in this case. We have pursued our own method in the order in which we have passed upon the questions, as tending to greater brevity than would be attained in following the assignment of errors presented.

Dennison v. The City of Keokuk.

In conclusion it may not be improper to say that it is a matter of regret that the law as to the compensation of a public officer is in such a state of uncertainty as to be the source of litigation in some instances, and in nearly all the counties of the State a matter of doubt and embarrassment with boards of supervisors.

The cause will be reversed and remanded for a new trial, each party to pay one-half the costs in this court.

REVERSED.

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d119 313

45 266
d126 402

45 266
144 193

DENNISON v. THE CITY OF KEOKUK.

FORD v. BRUCE ET AL.

1. **Tax Sale: LIEN OF CITY FOR TAXES.** The deed of the county treasurer of realty sold for State and county taxes does not divest the property in the hands of the purchaser of the lien of the city for unpaid taxes.
2. **— : CITY TAXES: TAXES OF PRIOR YEARS.** A sale for city taxes of one year does not divest the lien of the city for the unpaid taxes of prior years.
3. **— : — : PRIORITY OF LIEN.** The lien of the tax purchaser is subject to the lien of the city for the taxes of prior years.

Appeal from Lee District Court.

THURSDAY, DECEMBER 14.

THESE cases are submitted together as involving the same question of law. The plaintiffs respectively purchased certain lots in the city of Keokuk at tax sale for State and county taxes, and received respectively the county treasurer's deed therefor. At the time of said sale there were delinquent city taxes for several years due on said lots. Afterwards the said plaintiffs purchased the said respective lots at a city tax sale for taxes for the last one of the years for which the taxes were delinquent, and each received the city collector's deed. These suits were brought to quiet title. The city of Keokuk

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and some others were made defendants. The plaintiff, Dennison, set out in his petition his said treasurer's deed and collector's deed. The city answered, admitting the execution of the deeds, and by cross-petition set up a claim for taxes for the years for which they were delinquent prior to the year for the tax of which the lots were sold at the said city tax sale. To the answer and cross-petition of the city the plaintiff demurred. The plaintiff, Ford, set up in his petition the treasurer's deed. The city filed an answer and cross-petition, setting up its claim for taxes due prior thereto. The plaintiff then filed an amended petition setting up the city collector's deed. To the amended petition the city demurred. The other defendants were defaulted. The court below sustained the demurrer of the plaintiff, Dennison, to the answer and cross-petition of the city, and overruled the demurrer of the city to the amended petition of the plaintiff, Ford. The city appeals in both cases.

John Gibbons and J. H. Craig, for appellant.

Brown & Ford and M. R. King, for appellee.

ADAMS, J.—The first question presented is as to whether the deed of the county treasurer divested the lien of the city 1. TAX SALE: for taxes. In *Preston v. Van Gorder*, 31 Iowa, ^{lien of city for taxes.} 250, it was held that a sale of land for State and county taxes frees it in the hands of the purchaser from all liens for State and county taxes of prior years. This case is cited by the appellee as showing that such sale should free the land from all liens for city taxes of prior years. But the decision does not have that effect. It was based upon sections 784, 810 and 811 of the Revision, which provide that the treasurer's deed shall vest in the purchaser all the right, title, interest and claim of the State and county to the land, except liens in behalf of the school and university funds. While the city of Keokuk is in one sense a part of the State, we think its lien for taxes cannot be considered as a right, title, interest or claim of the State. It is contended by the appellee that the fact that the legislature made an exception

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in favor of the liens in behalf of the school and university funds and did not make an exception in favor of municipal corporations indicates that none was intended. If our view is correct, however, none was needed.

In addition it may be said that by section 763 of the Revision, and section 871 of the Code, it is provided that "the sale (for State and county taxes) shall be made for and in payment of the total amount of taxes, interest and costs due and unpaid." The purchaser, therefore, has a right to assume that the amount paid by him discharges all liens of the State and county and he bids upon such assumption. But the amount bid cannot cover city taxes if any are delinquent on the property, and he may properly enough be required to take notice of them and bid accordingly.

By the charter of the city of Keokuk city taxes are made a perpetual lien upon the real estate upon which they are assessed until they are paid. We cannot give to the treasurer's deed the effect which the appellee claims it has without abrogating this provision of the charter. It may be said that the law makes State and county taxes a perpetual lien also, and still that by *Preston v. Van Gorder*, above cited, a sale for the taxes of one year divests the liens for taxes of all other years. But this results from the doctrine of estoppel.

As the law requires the sale to be made for the total amount due, and the bidder has a right to assume that it is so made, it will be conclusively presumed in his favor afterwards that it was so made. The provision that the deed shall convey all the interest of the State and county effectuates only what would result upon the principle above stated. But it is said that the treasurer's deed conveys an independent title, and that that title originates in the sale, and could not be affected by any lien which had attached upon the property prior thereto. The treasurer's deed conveys precisely what the statute provides it shall and nothing more. It conveys the interest of the former owner and of the State and county, except the liens in behalf of the school and university funds. A lien for city taxes is a different interest and not covered by the provision.

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It would, in our judgment, be extremely unwise to allow a sale for state and county taxes to divest the lien which a city may have for city taxes, or to allow a sale for city taxes to divest the lien which the state and county may have for state and county taxes. The very provision made for a sale is based upon the assumption that it is not always practicable to collect without it. As some time must elapse after taxes become due before a sale can be made, it would be possible, if the doctrine of the appellee is correct, for the state and county to cut off no inconsiderable portion of the city revenue, and for the city to cut off no inconsiderable portion of the state and county revenue.

It is argued, and we confess with not a little force, that if the city should allow city taxes to become delinquent to the amount of the value of the property the state and county would thereby be deprived of their revenue; but it is not to be presumed that this will be done. It may happen in exceptional cases; but both city and property owner are interested in avoiding such a result.

We come now to consider whether a city tax deed, made in pursuance of a sale for the taxes of one year, divests the lien of the city for the taxes of prior years. As preliminary to this question, however, we have to consider a question of fact.

It is claimed by the appellee that it does not clearly appear from the collector's deeds that the said lots were sold at city tax sale for the taxes of only one year, and that possibly they were sold for all the taxes due. The deed to Dennison recites that, "there being no goods and chattels found out of which to make the annual taxes charged by the corporation of the city of Keokuk upon the lots in said city, hereinafter mentioned, for the year 1872, I, William Wilson, collector of Keokuk, gave due notice by publication that I would," etc. The deed to Ford contains a similar recital. This is all that is contained in either deed tending to show that the sale was made for the taxes of only one year; but, as we discover nothing tending to show that the sale was made for the taxes of more than one year we think that the appellee's position cannot be maintained.

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What effect, then, did the sale for the taxes of one year have upon the liens for taxes of prior years? It is claimed by the 2. ____: city ^{taxes: taxes} appellee that those liens were divested on the ground of estoppel; that the sale for city taxes must have this effect by analogy to the effect of the state and county tax sale. As we have seen, however, the ground of estoppel in the case of a state and county tax sale consists in the fact that, by law, the sale must be made for the total amount of taxes due. As the purchaser may buy upon the assumption that the law is complied with, the state and county should not afterward be heard to aver to the contrary.

In addition to this result by estoppel, it is expressly enacted that the treasurer's deed shall convey all the interest of the state and county. In determining what effect should be given to the collector's deed we find both of these elements wanting. It was not necessary for the city of Keokuk to sell for all the taxes due, nor is it provided that the collector's deed shall convey all the interest of the city. The collector's deed must have whatever effect it is provided by statute it shall have. By the laws of 1858, chapter 105, page 207, it is provided that the deed shall have the same effect as the county treasurer's deed under sales made by him, as provided in the Code. By Code is here meant, of course, the Code of 1851. What, then, was the effect of the treasurer's deed under the Code of 1851? Section 503 provides "that the purchaser will be entitled to a deed for the land so purchased by him upon the payment of the proper amount, which deed shall run in the name of the State of Iowa and be signed by the treasurer in his official name, and will convey the title to the land, and shall be presumptive evidence of the regularity of all prior proceedings. The purchaser acquires the lien of the tax on the land, and if he subsequently pays any taxes levied on the same he shall have the same lien for those, and may add them to the amount paid by him in the purchase."

It has been held that "the purchase creates between the purchaser and the owner the relation of mortgagee and mortgagor, and until foreclosure the right of possession remains in the owner." *Crosthwait v. Byington*, 11 Iowa, 532.

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Until foreclosed the owner has a right to redeem. The purchaser, then, acquires no interest in the land but a lien. It is true the legal title passes, but it is only to support the lien; and in respect to this lien it is to be observed that it is only a lien for the tax for which the sale is made. The language of the statute is: "The purchaser acquires the lien of *the tax*." The specific designation excludes taxes other than those for which the sale is made. If the owner desires to redeem he has only to pay the amount bid with interest, and not, also, all other taxes with interest that might be due on the property at the time of sale.

One other question remains to be determined: Is the purchaser's lien paramount or subject to the city's lien for the taxes of the prior years? We think it is subject. ^{3---: ---} <sub>priority of
lien.</sub> The purchaser may, by law, pay the other taxes and add them to his lien. The city cannot pay the purchaser and add the amount thus paid to its lien. The purchaser, therefore, in case his lien is regarded as subject, can protect himself. The city, in case its lien is regarded as subject, cannot protect itself.

We are of opinion that the District Court erred in sustaining the demurrer of the plaintiff, Dennison, to the answer and cross-petition of the city, and in overruling the demurrer to the plaintiff, Ford's, amended petition, and that both cases must be

REVERSED.

Trayer v. Reeder.

45	272
80	253
45	272
103	617
45	272
118	80
118	195
45	272
134	547
45	272
138	426

TRAYER v. REEDER.

1. **Practice: QUESTIONS ON APPEAL.** In an action at law questions must be raised in the court below to entitle them to a hearing in the Supreme Court.
2. **Evidence: CONSIDERATION FOR DEED: MAY BE SHOWN BY PAROL.** A deed is not evidence of the contract between the grantor and grantee, but simply the final consummation of the contract, and payment of the purchase money, together with possession of the property sold, constitutes a part performance sufficient to take the antecedent contract, where it rests in parol, out of the statute of frauds, and thus permit the introduction of oral evidence showing what the contract in fact was.

Appeal from Cedar Circuit Court.

FRIDAY, DECEMBER 15.

THIS action was commenced before a justice of the peace; the pleadings were oral. The plaintiff and one Carpenter were owners of adjoining farms; the plaintiff purchased of Carpenter a strip of land 2 rods wide and 128 rods long for the purpose of a road, and as a part of the consideration therefor agreed to build and keep up a certain portion of the fence along the lane on the west side. The plaintiff sold and conveyed his farm, including the two rod strip, to the defendant. The latter failed and refused to keep up the fence, and the plaintiff, being compelled to pay therefor, brings this action to recover the amount so paid. There was a trial by jury in the Circuit Court, verdict for plaintiff, and defendant appeals. The trial judge gave the certificate required by law.

Piatt & Carr, for appellant.

S. Yates, for appellee.

SEEVERS, CH. J.—The plaintiff conveyed the land to the defendant by the usual and ordinary deed, the consideration expressed therein being \$4,900. The covenants of warranty were in the usual form. No reservation or exception whatever was made in the deed, and there was no reference to the

Trayer v. Beeder.

Carpenter contract about the fence. The plaintiff sought to prove, by oral testimony, what the contract was between him and defendant, and that the latter agreed to build and maintain the fence, and that the plaintiff, in consideration of the agreement, sold, and agreed to take one hundred dollars less for the farm than he otherwise would have done. To the introduction of this evidence the defendant, at the proper time, objected, "for the reason that there was a written contract between the parties and parol evidence could not be introduced to vary its terms. The objection was overruled and the evidence admitted, to which defendant excepted." This presents the sole question for our consideration.

I. It is urged in argument that the agreement between the plaintiff and defendant is void because within the statute 1. ~~PRACTICE:~~ of frauds. To this it is sufficient to say that no questions on appeal such question was made in the court below. Neither in the objections made to the evidence, instructions asked or in the motion for a new trial, is there even a suggestion that any such objection was relied on, and it cannot, therefore, be raised for the first time in this court. *McNaught v. C. & N. W. R. R. Co.*, 30 Iowa, 336.

II. There was no contract in writing in relation to the sale of the land or obligation to build the fence, except the deed. 2. ~~EVIDENCE:~~ Whatever negotiations or contract of purchase and consideration for deed: may be shown by sale that preceded the deed existed wholly in parol. The deed is evidence of the final consummation of some contract previously made; but it is not evidence of what the contract was, and has nothing to do with it farther than to carry it out. *Puttman v. Haltey*, 24 Iowa, 425. It is clear there must have been an agreement preceding the deed, for the latter is the mere result of the negotiations between the parties.

Whether the deed is conclusive evidence that the contract has been carried out or performed depends upon what the contract in fact was. The contract, being in parol, could not have been enforced by legal proceedings, but the execution of the deed, payment of the purchase money or a part of it, together with the possession of the premises given and taken,

Trayer v. Reeder.

shows a part performance at least, which is sufficient under the statute. There having been such a performance neither party can rely on the statute as a defense to a full performance of the contract. It is a mistake to suppose the deed is the contract, or that no other evidence is admissible to show what the contract really was. This will be apparent by the thought that, if these parties had entered into a written contract preceding the execution of the deed in which the defendant had agreed, among other things, as a part of the consideration of his purchase, that he would build and maintain the fence, such contract, without doubt, could have been enforced, notwithstanding a deed was afterward executed which contained no reference to such contract.

The recognition or enforcement of the contract does not create a charge on the land; it is a mere personal claim against the defendant. He can sell and convey the land and his grantee will obtain a perfect title, nor will he be under any obligation to build or maintain the fence in the absence of an express agreement to do so. This being true, this contract was not within the covenants of the deed, and therefore a reference to it in the deed would have been out of place. Why except from the operation of the covenants what was not within them? Therefore, proof of the contract is not contradictory to the deed, as it would have been if it constituted an incumbrance on the land and was not excepted from the covenants of the deed. Rawle on Covenants for Title, 128.

The rule is well understood that parol evidence cannot be admitted to vary or contradict a written contract. Conceding the deed to be the contract, does the evidence introduced against defendant's objections vary its terms, or is it contradictory thereto? The deed is *prima facie* evidence of the consideration paid, but in this country at least it seems to be settled that, for *any purpose* short of affecting the title, the consideration clause is not conclusive evidence that the money has been paid, and is only *prima facie* evidence of the amount, which may by parol proof be shown to be greater or less than that shown in the deed. Rawle on Covenants for Title, 66, and authorities cited; *Lawton v. Buck-*

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ingham, 13 Iowa, 22; *Harper v. Perry*, 28 Iowa, 57; *Puttman v. Halcy, supra*. It has accordingly been held, where the deed recites (as is usual) that the consideration money has been paid, that this is not conclusive but may be contradicted by parol. *Wilkinson v. Scott*, 17 Mass., 249; *Shephard v. Little*, 14 Johns., 210. And it has also been held, and such seems the prevailing rule, that a consideration *dehors* the deed may be proved unless such consideration is repugnant to the deed. 2 Washburn on Real Property, 654; *Jackson v. Pike*, 9 Cowen, 69.

The deed states that in consideration of \$4,900 the plaintiff sold and conveyed the premises. Under the authorities cited the true consideration may be shown by parol, whether it be greater or less than the sum thus stated. In any view which may be taken the defendant's objections to the admission of the testimony were properly overruled, and the judgment of the Circuit Court must be

AFFIRMED.

BARR V. THE CITY OF OSKALOOSA ET AL.

1. **Highway: vacation of: damages.** The vacation of a highway does not confer upon an individual residing thereon a right of action for the recovery of damages, even though he may suffer inconvenience or loss thereby.
2. **—: use by railway company: damages.** Nor can the owner of abutting property recover damages for such a use of a street or highway as essentially deprives it of its character as a public highway.

45	275
106	261
45	275
119	270
45	275
126	360
45	275
134	128
45	275
139	593
139	594
141	603

Appeal from Mahaska District Court.

FRIDAY, DECEMBER 15.

The petition in substance alleges that on the 13th day of April, 1870, the plaintiff acquired title to, and has since that time owned, lots Nos. 5 and 6, situated upon the corner of what was formerly known as Kossuth street and Liberty street, in West Oskaloosa; that said street was dedicated to

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the public by John White, who laid out said lands into lots; that, upon the faith of the permanent use and occupancy of said streets as public ways, buildings were erected on said lots and were used and occupied by plaintiff's tenants for dwelling purposes; that for the purpose of avoiding the payment of any damages to the plaintiff and other property owners whose lands abutted on Kossuth street, in the city of Oskaloosa, and for the purpose of taking the control thereof for railway purposes, not as an additional easement upon said street, but for the purpose of occupying the same exclusively for railway purposes, the defendant, the Central Railroad Company, obtained of John White a quit claim deed, on the 28th day of October, 1870, conveying all the reversionary rights of said White in and to said Kossuth street; that on the 4th day of August, 1871, the city council of said city vacated said street by an ordinance; "that at the time of passing said ordinance the said Kossuth street was a graded street in good repair for use of travel for all purposes; that upon the passage of said ordinance the defendant, the city of Oskaloosa, permitted the said railway company to take and assume the control of the said street from High street north; and the said railway company by its agents and employes did take possession of the same, and did excavate the same, and fill the same with ties and iron rails, and did build therein switches, scales, side-tracks and all such devices as are usually used by railway companies; and they did excavate said street to the depth of six feet, and rendered the same wholly unfit for travel; and have filled said side-tracks with cars, engines and other obstructions, so as utterly to destroy it for all purposes of travel, except railway purposes, and have wholly excluded the plaintiff from all use of said street." To this petition the plaintiff afterwards filed an amendment as follows: "He avers that the addition of John White to the city of Oskaloosa was laid out and platted by two separate conveyances; one made on May 22d, 1853, which included the lots now owned by plaintiff, and one on May 24th, 1855, which included the lands immediately north of the premises of the plaintiff, and including the extension of said Kossuth street

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north of the premises of the plaintiff; that under and by virtue of said ordinance vacating said street, and under and by virtue of the said deed of conveyance from said John White, the said railway company has taken control of the entire street known as Kossuth street, and has totally destroyed the same as a public highway, and has rendered it impossible for the plaintiff or the public to use the same; that the said railway company claim and assume to hold said street as their private and individual property; that plaintiff has a dwelling house situated on said street, costing two thousand dollars, and has other costly and permanent improvements thereon; that by reason of the said illegal and wrongful acts the plaintiff has been greatly obstructed in the use of his said private property, and the value of the same has been almost wholly destroyed; that said railway company has cut down the grade of said street, and, by the excavation of the same, and by the manner in which said railway has been constructed, has wholly deprived the plaintiff of all use of the same. Wherefore the plaintiff claims damages in the sum of five hundred dollars." Attached to the petition are copies of the quit claim deed from John White, and of the ordinance vacating Kossuth street.

To this petition both defendants demurred. The demurrers were sustained, and, the plaintiff electing to stand upon his petition, the cause was dismissed. Plaintiff appeals.

John F. Lacey, for appellant.

Brown, Stone & Sears, for the Central Railroad Co.

Lafferty & Johnson, for the City of Oskaloosa.

DAY, J.—I. The plaintiff's claim for damages is based principally upon a want of power of the city of Oskaloosa to ^{1. HIGHWAY:} ~~vacation of:~~ ^{vacation} the street in question. The ordinance of ^{damages.} vacation was passed on the 4th day of August, 1871, and is as follows: "Be it ordained by the city council of the city of Oskaloosa, Iowa, that all that portion of Kos-
suth street in White's addition be and the same is hereby

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vacated; provided, that John White conveys the land or ground heretofore occupied by Kossuth street to the Central Railroad Company of Iowa; provided, further, that all the provisions of an ordinance heretofore passed, granting to said railroad company the right of way along and over said Kossuth street, are carried out by said railroad company; and provided, further, that the depots of said railroad company be located at the same point, on the line of said road, between Harrison and High streets."

The city of Oskaloosa was incorporated under the general incorporation law, chapter 51, Revision of 1860. Section 1064 of the Revision confers upon any municipal corporation organized under the provisions of that chapter power to lay off, open, widen, straighten or to narrow or vacate streets, alleys, public grounds, wharves, landing places and market places. This section clearly confers upon the city the power exercised in this case; and for an exercise of this legal right the city cannot be made to respond in damages. We have held that the vacation of a highway does not take from an individual residing thereon his property either for public or private use, and that he cannot recover damages therefor, although he may sustain inconvenience and loss therefrom. *Brady v. Shinkle*, 40 Iowa, 576; *Ellsworth v. Chickasaw County*, Id., 571. In *Pettingill v. Devin*, 35 Iowa, 344, the city charter provided for compensation whenever property was injured by the vacation of a street.

II. Many authorities have been cited by appellant respecting the right of the owner of a lot abutting upon a public ~~use~~ street to recover damages for such use of the street ~~by railway company~~ by a railroad as essentially deprives the street of damages, its ordinary character of a highway. We do not deem it necessary to enter upon this question or to attempt a review of the many cases cited, some of which seem to be in conflict with the prior decisions of this court. It is not claimed that the plaintiff in this case owned the fee in the street; upon the vacation of the street no interest reverted to him. The construction of the railroad over the property in question did not appropriate any property belonging to plain-

Ordway & Husted v. Phelps.

tiff, or any property in which, after the street was vacated, he had any interest. Whatever inconveniences he may suffer by the construction of a railroad over the property of others, no carelessness or negligence in such construction appearing, are injuries for which the law does not undertake to make compensation in damages. We think the judgment of the court below should be

AFFIRMED.

SEEVERS, CH. J., having been of counsel, took no part in this decision.

ORDWAY & HUSTED v. PHELPS.

1. **Guardian and Ward: ADJUSTMENT OF ACCOUNTS.** The adjustment of the accounts of the guardian of a deceased person must be made with the administrator, subject to the approval of the court.
2. **Practice: ADMINISTRATOR: ALLOWANCE BY.** The court may set aside or modify an allowance of a claim against an estate, approved by the administrator and allowed by the clerk in vacation, without any evidence except what may be shown by the papers.

45	279
84	5
45	279
138	353

Appeal from Black Hawk Circuit Court.

FRIDAY, DECEMBER 15.

THE facts are stated in the opinion.

Ordway & Husted, for appellants.

No appearance for appellee.

SEEVERS, CH. J.—On May 8th, 1876, the defendant was appointed and qualified as administrator of the estate of Merritt Potter, deceased, late of the State of Vermont. May 12th, 1876, the petition and claim of plaintiffs was presented to said administrator for allowance, said claim being for \$212.20 for professional services as attorneys in the case of Amos Gates, guardian of Merritt Potter, insane, v. R. Car-

Ordway & Husted v. Phelps.

penter, jr., et al., decided in this court at the April Term, 1876.

Attached to said claim was the affidavit of Amos Gates, stating "that during the lifetime of Merritt Potter he was the duly appointed and acting guardian of said Merritt Potter, and that as such guardian he employed Ordway & Husted to render services as attorneys of said Merritt Potter, and that said Ordway & Husted have duly rendered said services, and that there is now due and unpaid for said services the sum of \$212.20." Said claim and petition was approved and admitted in writing indorsed thereon, as follows:

"I hereby admit the within claim and waive notice of hearing. Dated May 10th, 1876.

"E. S. PHELPS, Administrator.

"Filed May 12th, 1876.

"J. C. GATES, Clerk."

May 12th, 1876, the clerk of the court made the following allowance of said claim:

"Estate of Merritt Potter, deceased. On this day are filed against said estate the claims as follows, to-wit: The claim of Ordway & Husted for two hundred and twelve dollars and twenty cents on account. * * * Said claims having been admitted by the administrator, the same are allowed by the clerk, and the administrator is directed to pay the same out of said estate, as provided by law."

June 10th, 1876, in the absence of both parties, the court on its own motion, and without the introduction of any evidence or any showing, made the following order:

"Estate of Merritt Potter, deceased. On this day it is ordered by the court that the order of the clerk of the court in vacation, on the 12th day of May, 1876, allowing the claims of Ordway & Husted, and of George Ordway, is hereby set aside, and said claims are disallowed, and the claim of J. L. Husted against said estate for the sum of \$65 is also disallowed. The claimants have leave to file them in the guardianship matter of Merritt Potter, insane."

To which order plaintiffs excepted.

Ordway & Husted v. Phelps.

The guardian of Merritt Potter made a report and filed the same in court on May 5th, 1876, showing that there was no property belonging to Merritt Potter except the undivided one-half of one hundred and sixty acres of land, and that no personal property came into his hands as such guardian.

As the guardian employed the attorneys, the court below seems to have been under the impression that the claim ^{1. GUARDIAN and ward: adjustment of accounts.} should have been presented to him, and by him settled and adjusted as a part of his guardianship.

In this we think the court erred. Upon the death of Potter the powers and duties of the guardian ceased except to make a report and account for any property which may have come into his hands. The adjustment of the accounts of the guardian of a deceased person must be made with the administrator, subject to the approval of the court. The administrator is the only person authorized to represent the estate of a deceased person. To him claims must be presented, and by him the same may be approved, and thereupon such claims may be allowed by the clerk. Code, § 2408.

All claims filed against an estate must be entitled in the name of the claimant against the executor, and if the same are not approved by the executor, they may be proved up as in an action by ordinary proceedings. Code, §§ 2409, 2411.

The allowance of any claim by the clerk is binding on all parties unless it is set aside or modified by the court at the ^{2. PRACTICE: administrator: allowance by.} next term. Code, § 2316. We are not prepared to say that the court may not set aside or modify an allowance made by the clerk without any evidence except what may be shown by the papers, or upon the knowledge or belief of the judge obtained in any way or from any source, and the claimant required to prove to the satisfaction of the court or jury the correctness of such claim. Nor are we prepared to say that the court may not order the administrator to defend a claim which he has approved.

That the court should possess such power seems essential when we consider that frequently administrators do not possess the requisite legal knowledge to enable them to determine whether the claim should or should not be allowed. Besides this, it

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frequently happens that the claimant gets the administrator appointed, and the latter allows the claim under the impression that such is his duty, and without thought or investigation.

So much, therefore, of the order of the Circuit Court as sets aside the allowance of the claims is affirmed, but the plaintiffs must be allowed to prove up their claims against the administrator. The order of the court requiring plaintiffs to file their claim against the guardian must be

REVERSED.

WAIDE v. JOY ET AL.

1. **Tender : CONTINUANCE OF.** The failure of a justice of the peace to pay to the clerk the sum tendered in a case appealed from the justice to the Circuit Court will not cause the tender to fail, at least until the party making the tender shall have had a reasonable time, after receiving notice of the non-payment, to procure an order upon the justice.

Appeal from Louisa Circuit Court.

FRIDAY, DECEMBER 15.

ACTION of replevin to recover possession of a song-book said to be worth one dollar and twenty-five cents, and to recover twenty dollars as damages for the wrongful detention of the song-book. The action was brought before a justice of the peace. A writ of replevin was issued and served; the book was taken by the officer and delivered to the plaintiff. The defendants then tendered and paid into the justice's court the costs which had been made, and as damages for the detention more than the value of the book. This the plaintiff declined to accept. There was a trial and judgment was rendered in favor of the plaintiff, and defendants appealed. The justice, in sending his transcript to the Circuit Court, omitted to send with it the said money tendered by defendant. Before the trial in the Circuit Court the plaintiff, with the purpose

Walde v. Joy.

of accepting the tender, as the record states, asked the clerk if the money was on deposit with him and was informed that it was not. A trial was then had and judgment was again rendered for the plaintiff.

The defendants moved to tax all costs against the plaintiff which accrued after the tender was made; the court overruled the motion. From the ruling of the court on the motion the defendants appeal.

Hurley & Hale and D. C. Cloud, for appellant.

Hoffman, Pickler & Brown, for appellee.

ADAMS, J.—The bill of exceptions does not show the amount which the plaintiff recovered. If it was greater than the amount tendered then the tender would not, of course, affect the question of the taxation of costs. But we think we may assume that the amount recovered was less. The bill of exceptions and certificate of the judge show that a question arose as to whether the tender was kept good, and it is upon that question that the court below certifies that it is desirable to have the opinion of this court. It is not for us to say that the question did not arise and dispose of the case upon another question upon which the record shows nothing.

The only question, then, is as to whether the tender was kept good. The money was deposited with the justice, where ^{1. TENDER:} it remained, and never was deposited in the Circuit Court. In *Mohn v. Stoner*, 14 Iowa, 115, a tender was made before the commencement of the suit; the money was not brought into court until the day before the trial. It was held that the tender was not kept good, and that to keep the tender good the money should have been brought into court sooner. Within what time, then, must the money in such case be brought into court in order to keep the tender good? Some time must necessarily elapse between the time the defendant is notified of the suit and the time when he could, with the utmost diligence, bring the money into court. During that time the tender must be considered as kept good, and we have no doubt that the defendant may

Walde v. Joy.

have a reasonable time, in view of all the circumstances of the case. The same principle, we think, should be applied in the present case. It was not the duty of the defendants to stand over the justice from the time they took their appeal until he filed the papers and transcript with the clerk of the Circuit Court, nor had they any power over the justice to compel him to perform his duty. The court had such power; but the court could not act until the justice had been guilty of an omission. If the tender failed the moment the justice was guilty of an omission in respect thereto, then the defendants were powerless to keep the tender good; but it did not fail the moment the omission took place. The defendants had a right to assume that the justice would make his return as the law directs. If he failed to do it they should have a reasonable time to procure an order. But they could not be expected to do this until they had knowledge of the omission, and they should have a reasonable time after they had such knowledge. The money having been placed in the custody of the law, and where it must find its way into the Circuit Court, if at all, without the instrumentality of the defendants, the tender cannot be considered as having failed until they are in some way in fault. They were certainly not in fault for the omission of the justice. If they were in fault at all it was because they did not exercise reasonable diligence in procuring an order upon the justice to send up the money.

But the question certified to us is as to whether the tender failed by reason of the failure of the justice to deposit the money with the clerk. We are of the opinion that it did not.

REVERSED.

 Burns v. Byrne.

BUENS V. BYRNE ET AL.

1. **Trust: EVIDENCE.** To establish a resulting trust in real estate, the evidence must be clear and satisfactory.
2. **Tenant in Common: ADVERSE POSSESSION: STATUTE OF LIMITATIONS.** The seizin and possession of one tenant in common are the seizin and possession of the others, and the statute of limitations will not operate in favor of the former to give him title by adverse possession unless it be sole and exclusive, with the knowledge and acquiescence of his co-tenants.
3. ——: ——: TAX SALE. The husband of a tenant in common cannot acquire a valid title to the common property by purchase of the same at tax sale.

Appeal from Dubuque District Court.

FRIDAY, DECEMBER 15.

THIS action was commenced October 21, 1872. The plaintiff's petition alleged that about the month of January, 1858, Patrick Pendergast departed this life, intestate, without issue, leaving surviving him his widow, Bridget Pendergast, and the plaintiff, his sister, and sole surviving heir; that at the time of his death he owned the north-east quarter and the north-west quarter of the south-east quarter of section one, township eighty-nine, range one west; that plaintiff resided in the State of New Jersey and never received any information of the death of her brother until a short time before the commencement of the suit, and that the defendant, Bridget Byrne, formerly Bridget Pendergast, concealed from her the death of her brother for the purpose of defrauding her of her interest in said estate; that the defendant, Bridget, conspired and agreed with the defendant, William Byrne, her husband, to cheat and defraud plaintiff by procuring a part of said premises, to-wit: the south half of the north-east quarter and the north-west quarter of the south-east quarter, to become delinquent for taxes, and to be sold therefor on the 8th day of September, 1867, to one Absalom Cain, and thereafter procured an assignment of the certificate of purchase to Wil-

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45	285
35	240
35	341
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102	157
45	285
108	719
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123	617
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132	439
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139	55

Burns v. Byrne.

liam Byrne, her husband, to whom a treasurer's deed for said premises was executed on the 16th day of November, 1870. The plaintiff prays that one-half of said estate may be set apart to her, and for general relief.

The defendants, for answer, deny the allegations of the petition, and allege that the defendant, Bridget Byrne, formerly Bridget Pendergast, at the time of the death of said Patrick was the owner in fee simple of the following portion of said premises, to-wit: the north fractional half of the north-east quarter of said section; that the remainder of the premises described, the south-west quarter of the north-east quarter, the south-east quarter of the north-east quarter, and the north-west quarter of the south-east quarter of said section, were entered by Patrick Pendergast with money belonging to the defendant, Bridget, and were by him held in trust for her at the time of his death; that for more than ten years defendants have been in open adverse possession, under claim of title and color of right, and the action is barred by the statute of limitations; that the defendant, William Byrne, is owner in fee simple of the last above described portion of said premises by virtue of a deed from the county treasurer of Dubuque county. The cause was tried by the court, and a decree was entered entitling plaintiff to one-half of the property shown to have been entered in the name of Patrick Pendergast.

Defendants appeal.

H. B. Fouke, for appellants.

E. McCeney and *Fred. O'Donnell*, for appellee.

DAY, J.—I. At the trial it was proved that the north fractional half of the north-east quarter referred to in plaintiff's petition was entered by the defendant, Bridget, before her marriage to Patrick Pendergast, and that a patent issued to her therefor December 1st, 1875. The court found against the plaintiff as to this portion of the property, and as to it no question is here made.

The defendant, Bridget, claims that the remainder of the property in controversy was entered by Patrick Pendergast

Burns v. Byrne.

with her money, and that, at the time of his death, he held it simply in trust for her. Each member of the court has carefully examined the testimony upon this point, and we unite in the conclusion that the evidence falls very far short of the clear and satisfactory proof necessary to establish a resulting trust in real estate.

II. The defendants claim that plaintiff's action is barred by the statute of limitations. Patrick Pendergast died in 1858, without issue, intestate, and seized of the real estate now in controversy. Upon his death the defendant, Bridget, his widow, and the plaintiff, his sister, became seized of the premises as tenants in common. The seizin and possession of one tenant in common are the seizin and possession of the other. One can never be disseized by another without an *actual ouster*. By *actual ouster* is not meant a physical eviction, but a possession attended with such circumstances as to evince a claim of exclusive right and title, and a denial of the right of the other tenants to participate in the profits. An actual ouster and consequent adverse possession might be inferred from sole possession and an exclusive reception and enjoyment of the rents and profits, with the knowledge and implied acquiescence of the other tenant in common, for the period of ten years. In this case the proof is simply that the defendants continued in possession of the premises from the time of the death of Patrick Pendergast to the time that this suit was commenced, a period of about fourteen years. The plaintiff did not know of the death of her brother until 1871. There can, therefore, be no presumption of any implied assent to the reception and appropriation of the profits by the defendants. We think, under the facts of this case, the plaintiff is not barred by the statute of limitations. In *Campbell v. Campbell*, 13 N. H., 488, "the owner of a farm died in 1778. One of his sons, then seventeen, carried on the farm, living there with the co-heirs until 1793, when the other heirs went away, and, his sisters having married, he continued in possession and management of the farm till his death in 1822, without, however, so far as appears, ever having made a claim

Burns v. Byrne.

of title to the whole farm. It was held that he acquired no title by adverse possession." See citation of this case in Angell on Limitations, fifth edition, p. 435, n. 5. That is a much stronger case in favor of the statute than the one at bar, for, in that case, the co-heirs had knowledge of their rights. "It has been held that if a widow remains in possession of land after her husband's death, and marries again, and she and her husband continue in possession for more than the time limited for the right of entry, neither he nor she can set up the statute against an ejectment by the children of the first husband." See Angell on Limitations, p. 379, and authorities cited.

III. The defendant, William Byrne, offered in evidence a treasurer's deed to himself for all the land entered by Patrick ^{a. — : —} Pendergast, and now in controversy, dated Nov. ^{tax sale.} 16, 1870, and reciting that the land was sold on the 3d day of September, 1867, for the delinquent taxes of 1865, to A. Cain, who assigned his certificate of purchase to William Byrne on the 17th of February, 1868.

The plaintiff objected to the introduction of this deed, and the objection was sustained. Of this action the defendants complain. The proof shows that William Byrne married the defendant, Bridget, within one year after the death of Patrick Pendergast; that he came to live with her on the place, and that he has been living there ever since.

The defendant, Bridget, being a tenant in common with plaintiff, could not acquire a valid tax title upon the property. *Austin v. Barrett*, 44 Iowa, 488.

It is claimed, however, that the defendant, William, can acquire a valid tax title against both the plaintiff and his wife, Bridget. We think this claim cannot be admitted. He was in possession of the property with his wife, and, so far as appears, was in enjoyment of the profits. It was his duty to see that the profits were applied to the payment of the taxes assessed. It would be a startling doctrine that a husband may possess and enjoy the profits of his wife's real estate, neglect to pay the taxes, purchase the property at the sale for the delinquency, and acquire a valid title. Such a

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refusal or neglect to pay taxes would be a fraud upon his wife, and would vitiate the title acquired. And it would be equally a fraud upon a tenant in common with the wife, for as to her he would be under the same obligation to see that the taxes are paid out of the profits of the land. The assignment of the certificate of purchase to Byrne placed him in the same position he would have occupied if he had himself bid in the land at the tax sale. In legal effect it operated as a redemption of the land from the tax sale, or a payment of the taxes. The case of *Fair v. Brown*, 40 Iowa, 209, bears some analogy to this case. There was no error, to the prejudice of appellants, in rejecting this deed, since if it had been admitted the decree must have been the same.

AFFIRMED.

MILLER ET AL. V. MAHAFFY ET AL.

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1. **Parties: ASSIGNMENT OF CONTRACT: PRACTICE.** To an action for canceling the assignment of a contract, alleged to be fraudulent, both the assignor and the assignee are necessary parties, and either may insist, either upon the trial below or upon the trial *de novo* in the Supreme Court, that a decree shall not be rendered against him until the other is brought into court.

Appeal from Montgomery Circuit Court.

FRIDAY, DECEMBER 15.

THIS is an equitable action triable anew in this court. The petition alleges, in substance, that plaintiffs are the owners of eighty acres of land by virtue of a written contract with the Burlington & Missouri River Railroad Company; that said contract of purchase was taken in the name of the defendant, Robert Miller, who is the brother of plaintiffs; that plaintiffs have paid on the contract the sum of \$275, and have held possession of said land since August, 1873, and that they have expended \$1,500 in building a house and in other improvements on said land; that defendant, Robert Miller, held

Miller v. Mahaffy.

the title as the trustee for plaintiffs and not as the owner, which fact was by defendant Mahaffy well known at all times since August, 1873, as well as the fact that plaintiffs were in possession of the land; that in March, 1875, the defendants fraudulently colluded together to deprive plaintiffs of said land, and the defendant, Robert Miller, then made a transfer of said land and railroad contract to defendant, Mahaffy, without the knowledge or consent of plaintiffs. The prayer of the petition is that said assignment and transfer of the contract be declared void, and that both of the defendants be barred from claiming title to said land, and for general relief.

The answer of the defendant, Mahaffy, alleges that he is the owner of said land; that he purchased the same of Robert Miller, who at the time was in possession and held the contract of purchase; that said contract was assigned to him, the said Mahaffy, with the full knowledge and consent of the plaintiffs; that in June, 1875, after his purchase, he paid to the railroad company the matured payment on said land, amounting to \$152, and also the taxes, with the full knowledge and consent of the plaintiffs; that Joseph Miller, one of the plaintiffs, with the full knowledge of the other plaintiffs, leased of defendant, Mahaffy, the premises in question, for the cropping season of 1875, and that all of said plaintiffs have been occupying said premises as tenants of defendant, Mahaffy, and are therefore estopped from claiming title as against him.

The reply alleges that the lease of said land by plaintiff, Joseph Miller, was procured and consummated by the fraudulent representations of defendant, Mahaffy, of the facts relating to said transfer, and that the other plaintiffs were in no way connected with said lease when it was made, and that at the time of making said lease said Joseph Miller was an unmarried man under the age of 21 years, and he now does, and has since he became of age, refused to ratify said lease. It does not appear that the defendant, Robert Miller, was served with an original notice of the pendency of the action; at least no proof of service was made, by publication or otherwise. He is a resident of the State of California. Trial was had as between

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the plaintiffs and the defendant, Mahaffy, and a decree rendered declaring the assignment to Mahaffy to be fraudulent and void, excepting as to the undivided one-sixth of the land, and quieting plaintiffs' title to the other five-sixths, and awarding judgment against plaintiffs for \$128, being the five-sixths of the amount paid by Mahaffy to the railroad company and the same proportion of the taxes paid by him. Defendant, Mahaffy, appeals.

McPherson & Scott, for appellant.

Hanna Bros., for appellee.

ROTHBROCK, J.—It is urged by appellant that no decree can be rendered against him because Robert Miller is not a party

^{1. PARTIES:} ~~assignment of contract:~~ to the suit. The petition includes his name as a party defendant and prays that the assignment of practice. the contract made by him be canceled for fraud.

There is evidence tending to show that the plaintiffs and Robert Miller owned this land in common, each holding an undivided one-sixth, and that the sale made by Robert to Mahaffy and the assignment of the contract with the railroad company was not without consideration, and that a large part of the purchase money is yet unpaid. Under these circumstances Robert Miller is a necessary party defendant. His rights cannot be adjudicated without making him a party, and it is the right of Mahaffy to insist that, before there shall be a decree canceling the assignment of the railroad contract for fraud, both of the parties to the alleged fraud shall be subject to the jurisdiction of the court.

There being no defect of parties apparent on the face of the petition, a demurrer for this cause would not lie. The Code, section 2650, provides "that when any of the matters enumerated as grounds of demurrer do not appear on the face of the petition the objection may be taken by answer. If no such objection is taken it shall be deemed waived."

It is claimed by counsel for appellee that under this provision of the statute the objection should have been made by answer. It seems to us that an answer setting up the fact

Cooney v. Moroney.

that one of the defendants named in the petition had not been served with an original notice, would be an anomaly in our practice. We believe that it was the right of the defendant to insist in the court below, and as the cause is triable anew here, to insist now that no decree shall be rendered against him until the other necessary party be brought before the court. It was incumbent upon plaintiffs to see to it that jurisdiction of Robert Miller was obtained, and we must hold that the decree against appellant was unauthorized because of the want of such jurisdiction.

As we are thus met at the threshold with an insuperable obstacle to the further progress of the cause in this court, it is not necessary to determine whether, upon the evidence, the plaintiffs are entitled to relief. The decree will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

COONEY V. MORONEY ET AL.

1. **Jurisdiction: ATTACHMENT.** In an action by attachment in the Circuit Court, upon a note not yet due, the attachment is the subject matter of the action in such sense that an injunction will not be granted by the District Court restraining the defendant from making waste of the property attached.

Appeal from Buchanan District Court.

FRIDAY, DECEMBER 15.

THE petition states that plaintiff had commenced suit by attachment in the Circuit Court against the defendants, upon a note not due until January, 1877; that certain timber growing on land described in petition had been attached; that defendants are insolvent and are engaged in cutting down and carrying away said timber, and an injunction is prayed, which being granted, the defendants moved to dissolve the same, and such motion being overruled they appeal.

Cooney v. Moroney.

Bruckart & Ney and *E. M. Carr*, for appellants.

No appearance for appellee.

SEEVERS, CH. J.—The ground of the motion to dissolve the injunction was because it affected the subject matter of an ^{1. INJUNCTION:} action pending in the Circuit Court, and therefore the District Court or Judge thereof had no attachment power to grant the same.

The injunction proceeding was brought in the District Court, and the Code, Sec. 3389, provides: “But in cases where an action is pending, and the injunction is applied for to affect the subject matter of such action, it can only be granted by the court, or judge thereof, in which such action is pending.” The only question then, is, does the injunction affect the subject matter of an action pending in the Circuit Court? The debt in the attachment proceeding not being due, no action could be brought thereon except by attachment. The attachment, therefore, was the principal thing; it was the gist of the proceeding. It was the subject matter of the action, because no action could have been brought on the debt except aided by attachment. Code, Sec. 2956.

The property attached, in a certain sense, was in the custody, or at least the control, of the Circuit Court, and it could, upon proper showing, have protected the property, or its custodian, the sheriff. There was no necessity, therefore, for a resort to any other court. Beside this, the very object and intent of the statute was to prevent one court from interfering with an action or proceeding pending in another court.

There may be more than one subject matter embraced in an action, and we are of opinion the attachment and property attached in this action is a subject matter embraced therein, and that the motion to dissolve the injunction was erroneously overruled.

REVERSED.

Meek v. Meek.

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103	784
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122	431
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131	322
45	294
133	575

MEEK v. MEEK.

1. **Statute of Limitations: REVIVOR OF JUDGMENT.** The revivor of a judgment by *scire facias* is simply a proceeding to enforce the judgment, and does not have the effect of a new judgment, with respect to the operation of the statute of limitations. The statute commences to run at the date of the original judgment.
2. ——: **CONSTITUTIONAL LAW.** The statute of limitations pertains to the remedy, and not to the right of action or validity of the cause of action, and the States are not prevented by Art. IV, Sec. 1, of the Constitution of the United States, from enacting such statutes barring actions upon judgments rendered in other States.

Appeal from Washington Circuit Court.

FRIDAY, DECEMBER 15.

ACTION at law upon a judgment rendered in the Court of Common Pleas of Carroll county, Ohio, November 16, 1850. A demurrer to the petition of plaintiff was sustained and judgment rendered thereon for defendant. Plaintiff appeals.

G. W. How, for appellant.

McJunkin, Henderson & Jones, for appellee.

BECK, J.—I. The petition, after alleging the recovery of the judgment sued upon, on the 16th day of November, 1850, in the Court of Common Pleas of Carroll county, Ohio, and setting out a copy thereof, shows that the judgment was revived by *scire facias*, September 8, 1873. It does not appear that the *scire facias* was personally served, though the order of revivor shows that the court found that service was duly had according to law. Another *scire facias* was issued and personally served upon defendant in Washington county, in this State, and thereon an order of revivor was had, May 2, 1874. The final order in each proceeding is, that “the judgment stand revived,” and that execution issue against the defendant for an amount found due, with costs. Duly authenticated copies of the judgment and orders of revivor are made

Meek v. Meek.

exhibits to the petition. The orders of revivor show that, at the time of the rendition of the original judgment, and ever since, defendant was and has continued to be a non-resident of the State of Ohio.

To the petition defendant demurred, assigning five grounds upon which he claims the petition shows the action cannot be maintained. These several causes of demurrer may be reduced to two, which present the substance of all, as follows:

1. The cause of action is barred by the statute of limitations.

2. The orders of revivor are not valid and binding upon defendant; the first having been procured upon the service of process by publication, the second by personal service in this State.

II. In our opinion, the determination of the question raised upon the first ground of demurrer will dispose of the ^{1. STATUTE of} ~~revivor of~~ case, and render unnecessary the consideration of ^{judgment.} the other objection. We will, therefore, proceed to inquire whether, upon the facts alleged in the petition, the action is barred by the statute of limitations.

Under the law of this State an action upon a judgment of a court of record is barred in twenty years, and this provision extends to judgments recovered in the courts of sister States and of the United States. Code, § 2529, ¶ 6. The original judgment declared on in plaintiff's petition was recovered in 1850; this action was brought in 1875. If the period of limitation prescribed by the statute commences at the date of the original judgment, the action is barred. But plaintiff insists that the judgments of revivor arrested the operation of the statute and the period of limitation dates therefrom. The question presented in this position now demands our attention.

Under the laws of the State of Ohio, judgments, after the expiration of five years, become dormant and cease to operate as liens, and must be revived before executions can issue thereon. Upon proper proceedings, in the nature of *scire facias*, "if sufficient cause be not shown to the contrary, the judgment shall stand revived for the amount which the court shall find to remain due and unsatisfied," and a judgment to

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that effect is entered. Swan & Critchfield's Ohio Statutes, pp. 1061, 1067-1068.

The orders reviving the original judgment conform to the provisions of the statute and direct execution to issue for the amount found due plaintiff. So far as we can discover, the proceedings authorized by the Ohio statute are in no respect different in their nature from those which are usually had upon *scire facias*, indeed, the proceedings must be termed as those of *scire facias*. The final judgment directed by the statute to be entered therein is not a new judgment, but the revivor of the old one. This has been directly ruled in this State under a statute not unlike the Ohio statute in question. Code, 1851, §§ 1887, 2176-2178; *Denegre v. Haun*, 13 Iowa, 240; *Vredenburgh v. Snyder*, 6 Iowa, 39. And it would seem that the ruling is in accord with the authorities. We are unable to discover that a different rule prevails in Ohio; counsel for plaintiff makes no such claim and refers to no Ohio decision on this point. The revivor of a judgment by *scire facias* is, then, but a proceeding to enforce it—to authorize the issuing of process of execution thereon. No new judgment is entered. It is, then, very plain that the period of limitation begins at the date of the original judgment, and not at the date of the judgment upon the *scire facias*, which is a mere step taken for the enforcement of the original judgment. This is rendered, if possible, plainer by the fact that the action is brought on the original judgment and not on the order upon the *scire facias*. The judgment became dormant, that is, execution could not issue thereon. The *scire facias* revived the right to process on the judgment, which was its sole purpose and only effect.

In support of his position, that the statute of limitations begins to run only from the date of the revivor, plaintiff cites *Fagan v. Bentley*, 32 Geo., 534. This case, as well as three or four Irish decisions to which we have been referred, hold that the judgment in *scire facias*, under statutes similar to our own and the Ohio statute, is to be regarded as a new judgment, and the statute of limitations must be regarded as beginning to run therefrom and not from the date of the original judg-

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ment. They are in conflict with the decisions of this court, above cited, which we are required to follow rather than those of other courts. We think the rule of this court is based upon sound reason; we have, therefore, no disposition to disturb it.

III. Plaintiff insists that, under Art. IV, § 1, of the Constitution of the United States, and the Act of Congress of 2 —: con- May 26, 1790, he is secured in a remedy upon the ^{constitutional} judgment in suit, and the State statute of limitations cannot bar recovery thereon as long as it may be enforced in Ohio. The argument relied upon to support this position is this: The constitutional provisions secure, in each State, full faith and credit to the judicial proceedings of all other States, and the act cited provides that such proceedings, being authenticated in the manner prescribed, "shall have such faith and credit given to them in every court in the United States as they have by law or usage in the courts of the State whence the records are or may be taken."

The judgment sued upon is valid and may be enforced in the State of Ohio—it is not barred there by a statute of limitation. It follows, it is insisted in the argument, that, under these constitutional and statutory provisions, it must be enforced here. The error in the argument results from failing to consider the fact that the statute of limitations pertains to the remedy and not to the right of action or validity of the cause of action. Story's Conflict of Laws, § 376; 2 Story on the Constitution, § 1385.

The United States Supreme Court has decided the question raised by plaintiff, holding that the provisions, constitutional and statutory, relied upon by plaintiff, do not prevent the several States from enacting statutes of limitations barring actions upon judgments rendered in other States. *Bank of the State of Alabama v. Dalton*, 9 How., 522; *M'Elroy v. Cohen*, 13 Peters, 312; *Randolph v. King*, 2 Bond, 104.

IV. It is lastly insisted that the petition does not show that defendant was a resident of this State for the full period of limitation, and, as the question is raised upon demurrer, it cannot be presumed that he has resided here for a time that will entitle him to a benefit of the statute.

Handrahan v. O'Regan.

The record of the judgment and of the orders of revivor upon which this action is brought are made a part of the petition. They show that defendant, at the time of the rendition of the judgment and ever since, was not a resident of the State of Ohio. They show that in 1873 he resided in this State, and he appears to have resided here when this suit was commenced. Upon these facts a presumption arises that he has resided here continuously from a period anterior to the rendition of the Ohio judgment in 1850. *Swift v. Swift*, 9 La., 117.

The foregoing discussion disposes of all the questions in the case which we are required to determine. The judgment of the Circuit Court is

AFFIRMED.

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HANDRAHAN v. O'REGAN.

1. **Contract: SUBSEQUENT PROMISE: CONSIDERATION.** If one leases land to which there is no road to another party, but subsequently promises to procure one, the fact that without the road the lessee would not be able to pay his rent does not constitute a sufficient consideration for the promise.
2. —— : —— : **DISADVANTAGE TO PROMISEE.** While disadvantage accruing to the promisee may constitute a sufficient consideration for a promise, yet it must appear that the disadvantage was suffered at the request of the promisor, express or implied.
3. **Landlord and Tenant: MEANS OF ACCESS.** Whoever takes a lease of land must ascertain at his peril whether or not the land is accessible, and the landlord is guilty of no fraud if he fail to apprise the tenant that there is no road communicating with the premises.

Appeal from Dubuque District Court.

FRIDAY, DECEMBER 15.

ACTION upon a written agreement to recover \$120 for rent of forty acres of land. The defendant for answer admits the execution of the agreement, but avers that to the forty acres of land there was no communication from the main road,

Handrahan v. O'Regan.

whereby said land could be reached and cultivated without trespassing upon the premises of others; that subsequent to the execution of said agreement the plaintiff was informed by this defendant that there was no road or passage over which communication could be had to said land, and plaintiff promised and agreed verbally to procure a road from the main road to said land, but the defendant avers no road ever was procured for, or allowed to, said premises; by reason whereof he was damaged in the sum of \$150 for which he asks judgment. The court found that there was due the defendant \$80, as damages for failure to procure the road, and rendered judgment for plaintiff for \$40. The plaintiff appeals.

H. B. Fouke, for appellant.

E. McCeney and Fred. O'Donnell, for appellee.

ADAMS, J.—There is no averment that the plaintiff owned land adjoining the leased land. There was, therefore, no right of way by necessity. Indeed the defendant relies solely upon the subsequent agreement. The plaintiff denies such agreement, but the court below found that it was made, and as the evidence is conflicting, except as to consideration, the finding of the court below cannot be disturbed unless it appears that the agreement was without consideration.

On this point the appellee's counsel say: "1st. The promisor was benefitted by such agreement, because it would put the promisee in the way to pay rent, which he could not do without the road; 2d. The promisee was not only troubled and inconvenienced by the promise in putting in his crops, which he could have done if he had not been promised a road, but he was also greatly damaged by the agreement because relying upon it he proceeded to cultivate the place, having to steal in when opportunity afforded, and was thus too late in planting, while if no such agreement had been made he might have procured (if bound to do so) a right to pass over other land immediately adjoining, and thereby gotten his crop planted in proper season."

To our mind, if such were the facts, no consideration would

Handrahan v. O'Regan.

appear therefrom. If a person should buy a tract of land to which there is no road, and take a conveyance 1. CONTRACT: subsequent promise: con- leaving a part or all of the purchase money un- sideration. paid, and afterward the grantor, believing that he could procure a road for the grantee, should promise to do so, but should fail to fulfill his promise, would it be a sufficient consideration to support the promise that with the road the grantee would have been able to pay for the land, and was not able without it? No one would claim that it would. Yet we can see no difference in principle between a sale and lease of land so far as this question is concerned. There are doubtless many things, which, if a landlord were to furnish his tenant, would facilitate him in paying his rent, if he was otherwise unable to do so. But such fact would not be a sufficient consideration to support a promise to furnish them.

We proceed now to consider the second ground. Briefly stated, it seems to be this: The defendant relied upon plaintiff's promise, and omitted to procure a road for himself as he otherwise might have done, and was thereby delayed, and failed to get in his crop in season. Now it is true that a disadvantage accruing to the promisee may constitute a consideration for a promise, but to have that effect it must appear that the disadvantage was suffered at the request of the promisor, expressed or implied. There is no evidence of such fact in this case.

It is contended by the defendant that the plaintiff defrauded him by leasing to him land to which there was apparently a road, there being some marks of travel. If the plaintiff induced the defendant to enter into the lease by fraud, the defendant could in a court of equity have procured its cancellation. Again, if after the fraud was discovered he had agreed to waive the fraud, and did waive it by reason of the plaintiff's promise to procure him a road, such waiver would constitute a consideration for the promise. But the evidence shows clearly that nothing was said between plaintiff and defendant in regard to a road until after the lease was executed. There was then no fraud on the part of the plaintiff. Whoever buys, or takes a lease

3. LANDLORD and tenant: means of access.

In the Matter of the Assignment of Holt.

of land, must inquire and ascertain for himself in regard to the means of access. If access is yet to be procured, the value of the premises is supposed to be estimated accordingly. Neither a purchaser nor a lessee would be justified in assuming that there is an established road to the premises because there may be marks of travel. If a grantor or lessor makes no representations upon the subject, he will not be guilty of a fraud. His silence will not be fraudulent. There having been no fraud in this case there was no waiver of fraud, and no consideration by reason thereof.

We are of the opinion that the judgment of the District Court must be

REVERSED.

45	301
78	424
45	301
94	446

IN THE MATTER OF THE ASSIGNMENT OF HOLT.

1. **Assignment: TIME OF FILING CLAIM.** A creditor who fails to file his claim with the assignee within three months after the first publication of the notice of assignment is not entitled to share *pro rata* in the dividends of the estate.

Appeal from Johnson District Court.

FRIDAY, DECEMBER 15.

THE notice of assignment was published first the 28th day of January, 1876. Notice was mailed to each creditor the 29th day of January, 1876. J. G. Abell filed a claim May 22d, 1876, and moved for an order that he be paid a *pro rata* share. Other creditors who had filed claims within three months from the date of first publication resisted said Abell's motion on the ground that his claim was filed more than three months after the date of first publication. The District Court sustained the motion. The other creditors appeal.

Clark & Haddock, Baker & Ball, Finch & Matthews,
for appellants.

Edmonds & Younkin, for appellees.

In the Matter of the Assignment of Holt.

ADAMS, J.—By section 2120 of the Code it is made the duty of the assignee, at the expiration of three months from <sup>1. ASSIGN-
MENT: time</sup> the time of first publishing notice, to report and file with the clerk of the court a list, under oath, of all such creditors of the assignee as shall have claimed to be such, with a statement of their claims. By section 2121 it is provided that any person interested may appear within three months after filing such report and file with the clerk exceptions to the claim of any creditor. There is no provision requiring the assignee to make any other report within any specified time. On the other hand, it is provided by section 2122 that, if no exceptions are filed, the court shall order the assignee to make from time to time fair and equal dividends among the creditors, in proportion to their claims. It is evident that this may be done before the expiration of three months from the last publication, if publication be continued long enough, and we see no reason why the assets may not be exhausted before that time.

It may be claimed that, conceding this to be so, the claimant who files his claim between the expiration of three months from the first publication and the expiration of three months from the last publication should share *pro rata* in such assets as are not exhausted. The answer to that is, that any one interested has three months to file exceptions to such claim after it has been reported by the assignee, and there is no provision as to when such report should be made. Those who file within three months from the first publication file in time to enable their claims to be embraced in the assignee's report, which must be made within a required time. Why should payment to them be delayed to enable others to share *pro rata* whose claims are not filed soon enough to be reported? Why, indeed, should a report be required before the claims are all in which are entitled to share *pro rata* in the first dividends?

If section 2126 stood alone we should be inclined to think that claims filed within three months from completed publication should participate in the first dividends; but we cannot

Brooks v. Keister.

put this construction upon that section consistently with the other sections to which we have referred.

We think the District Court erred in sustaining the claimant's motion.

REVERSED.

BROOKS v. KEISTER.

1. **Judicial Sale: REDEMPTION: MORTGAGE.** F. executed a mortgage upon realty to secure certain notes. He afterward sold the land to S. subject to the mortgage, and contracted with B. to protect him from personal liability upon the notes. The land was sold under a judgment against S., and the purchaser, K., received a sheriff's deed therefor. The mortgage was afterward foreclosed and K. also became the assignee of the sheriff's certificate of sale thereunder. The land failing to sell for the whole of the mortgage debt, B. became liable for, and paid the remainder, and brought an action to be allowed to redeem the land from the foreclosure sale: *Held*, that K., being the owner of the land under the former execution sale, was alone entitled to redeem, and that his purchase of the certificate of sale was in effect a redemption. ROTHROCK, J., dissenting.

Appeal from Tama District Court.

SATURDAY, DECEMBER 16.

Action in equity. The case is presented to this court upon an agreed abstract containing the evidence, being mostly an agreed statement of the facts, and the decree of the District Court. No part of the proceedings is given. The decree granted the relief prayed for by plaintiff. Defendant appeals.

Ebersole & Willett and Stivers & Leland, for appellant.

Struble & Goodrich, for appellee.

BECK, J.—The facts of the case as disclosed by the abstract before us are as follows:

1. Foster executed to J. J. & D. N. Stevens four promissory notes which were secured upon 160 acres of land. Three

Brooks v. Kelster.

of these notes were transferred to defendant, and the other became the property of J. J. Stevens. Defendant brought an action of foreclosure on the three notes held by him and a decree was rendered thereon, upon which 120 acres of the land was sold, defendant becoming the purchaser and obtaining a sheriff's deed therefor. The judgment upon the three notes was satisfied by this sale.

2. The mortgage was foreclosed upon the remaining forty acres of land in an action by J. J. Stevens to enforce the security for the payment of the note held by him, and defendant became the assignee of the sheriff's certificate of sale from the purchaser of the forty acre tract under the decree. This land was not sold for enough to pay the amount found due on the note by the decree, \$379 remaining unpaid. The sale was with redemption under the statute.

3. Prior to the foreclosure of the mortgage on both of these actions Foster had sold the land, executing therefor a warranty deed; the purchaser, Louisa J. Stevens, assumed and undertook to pay the debts secured by the mortgage but failed to make any payment thereon.

4. In order to protect himself against the liability which would arise against him upon the mortgage and notes in case the land should sell for less than the amount due thereon, Foster entered into a contract with plaintiff by which the latter, in consideration of \$100, bound himself to protect and keep Foster harmless from any liability to pay the amount remaining due on the notes after the sale of the land upon the foreclosure of the mortgage. He agreed to bid at the sale of the land and "run it up" to the amount due upon the notes. Plaintiff attended the sale of the 120 acres of land upon the first foreclosure and "run it up" to an amount exceeding, in a small sum, the debt, interest and costs, but failed, in any manner, to perform his agreement as to the second sale, and the land was sold thereon for less than the amount of the decree.

5. Foster thereupon brought an action upon the contract against plaintiff and recovered judgment for and collected the amount of the decree in the last foreclosure remaining unsatisfied.

Brooks v. Keister.

6. The time of redemption under the last named sale remaining unexpired, plaintiff tendered to defendant, the holder of the certificate, the amount due thereon with interest, and claimed an assignment thereof. He brings this action to enforce the assignment of the certificate and the execution to him of a sheriff's deed.

7. Of other facts which, in our opinion, may be considered in determining the rights of the parties, we think it necessary to mention only the following: After the purchase of the land by Louisa J. Stevens, in a chancery action it was made subject to a judgment against her husband and sold thereon. Defendant became the purchaser and received a sheriff's deed for the land. This was before plaintiff tendered the amount of the certificate and claimed its assignment to himself.

It is not claimed that plaintiff is, under the statute, entitled to redeem from the sale upon which the certificate
1. JUDICIAL
sale: redemp-
tion : mort-
gage. to defendant was issued. The following quotation from the argument of his counsel presents the ground upon which his claim is based:

"We predicate Brooks' right to have the certificate in question assigned to him, on payment to Keister of the amount paid by him, upon the well recognized rule that where one person pays money for the benefit of another who is primarily bound for its payment, and who has received property for that purpose, equity will subrogate him to all the rights of the person for whose benefit such payment is made, and will transfer to him any property charged with the payment of such debt."

In support of this view of the case it is urged that if Louisa J. Stevens had purchased the land at sheriff's sale, plaintiff could have compelled her to assign to him the certificate, and as defendant acquired all the interest of the party named in the land, he holds it subject to the same equity which would have bound her had she purchased the land at sheriff's sale. But this position cannot be admitted. Had Louisa J. Stevens purchased the land at the sheriff's sale, plaintiff's right to enforce the assignment in that case, if it existed, would have been based upon the obligation resting upon her to pay

Brooks v. Keister.

the debt. But no such obligation rests upon defendant. She was personally liable, under her covenant, to pay the mortgage debt. The obligation of that covenant was never assumed by defendant, nor was it transferred to him by his acquisition of the land by his purchase at sheriff's sale, or the assignment of the certificate to him. The second execution sale was made to one Stivers, who sold and assigned the certificate to the defendant.

At the time of the execution sale to Stivers of the forty acre tract in question, Keister was the owner of the equity of redemption. He alone had the right to redeem from Stivers. If plaintiff had purchased Stivers' certificate Keister would have had a right to redeem from plaintiff; this results from the fact that it was Keister's land that was sold. When Keister bought Stivers' certificate he held a certificate of sale for his own land; he had essentially redeemed from Stivers, as he had a right to do. But neither plaintiff, nor any one else, could redeem from Keister. No one could redeem as owner because Keister was the owner. No one could redeem as lien holder because there was no lien holder. The only lien upon the property had been extinguished upon Keister acquiring the certificate of sale. It was vain, therefore, for plaintiff to attempt to redeem, either in his own name or in Foster's, or in that of any other person. Neither he nor any one, except Keister, sustained such relation to the property as conferred the right of redemption from the sale; this right Keister exercised in acquiring the certificate. Besides, to hold that any one except Keister could redeem would be to confer on such an one the power to take from Keister what he had acquired by first purchasing the equity of redemption, and then by extinguishing the incumbrance.

It is our opinion that plaintiff was not entitled to the relief prayed for in his petition. It ought, therefore, to be dismissed.

REVERSED.

ROTHBROCK, J., dissenting.—I cannot concur in the conclusion reached in the foregoing opinion. The legal effect of the

Brooks v. Keister.

contract between Brooks and Foster was to place the former in the position of the latter with reference to the mortgage debt. By taking Foster's place and standing between him and the defendant, Brooks had the same rights that Foster would have had if the contract between them had not been made. Brooks was not a party to either of the foreclosure proceedings, and his rights were not extinguished by the decree upon which the sale of the land he now seeks to redeem was made. Louisa J. Stevens being primarily liable to pay the debt, it being part of the consideration for her purchase of the land from Foster, there is no doubt in my mind that Brooks, by reason of his contract with Foster, had the right to redeem from the purchaser at the foreclosure sale. It is entirely immaterial whether this offer to redeem be in the name of Foster or under Foster, or in the name of Brooks. By assuming the obligation of Foster and paying the debt to him, or for him, his right to redeem in his own name was complete. Foster had no interest in the redemption. The plaintiff, when he tendered the amount necessary for an assignment of the certificate of sale, had satisfied all claim of Foster in the premises.

The fact that Keister, the party holding the certificate of purchase, had obtained the interest of Louisa J. Stevens in the land, with notice of her liability to pay the mortgage, did not render him personally liable to pay the debt, but such fact certainly would not operate to prefer the debt of her husband to that of the mortgage, or rather to the right of Foster or Brooks to subject the land to the payment of the mortgage.

No wrong would be done Keister by allowing Brooks to redeem. The effect would only be to postpone the lien of the debt of the husband of Louisa J. Stevens to the mortgage lien for the purchase money of the land, and it seems to me this would be equity.

Smith v. Johnson.

45	308
46	203
45	308
98	388
45	308
94	59
45	308
98	158
45	308
116	842

SMITH V. JOHNSON ET AL.

1. **Evidence: ADMINISTRATOR: SERVICES.** In an action against an administrator for services rendered the decedent, the plaintiff cannot be permitted to testify in his own behalf to the facts which would raise an implied contract to pay for the services.
2. **Services: WHEN MINOR CANNOT RECOVER FOR: CONTRACT.** A minor who resides in the family of a stranger in the character of friend, dependent, or protege, in the absence of an express contract cannot recover for the services rendered the family during the period of such residence.
3. **Practice in the Supreme Court: ADMISSION OF EVIDENCE.** The rulings of the court below upon the admission of evidence will be reviewed by the Supreme Court if prejudice therefrom affirmatively appears, even though the record does not contain all the evidence in the case.
4. **— : — : ERROR WITHOUT PREJUDICE.** The admission of incompetent evidence will not be held to be error without prejudice where such evidence constitutes the whole of the proof of the party offering it, or adds to the weight of testimony in his behalf.

Appeal from Benton Circuit Court.

SATURDAY, DECEMBER 16.

THE plaintiff filed a claim against the estate of which defendants are the administrators, for work and labor performed for the intestate in his lifetime. The administrators refusing to allow any part of the claim, an issue was joined thereon and the cause was tried to the court without a jury. A judgment was rendered for plaintiff upon a finding of facts by the court. Defendants appeal.

Gilchrist & Haines, for appellants.

O. L. Cooper and E.d. Langley, for appellee.

BECK, J.—I. There is no proof that the services for which plaintiff claims to recover were rendered under an express contract. Upon the trial of the cause the plaintiff was permitted to testify in his own behalf, against defendant's objection, to the facts that he performed labor for

Smith v. Johnson.

the decedent, the time he was engaged in such service, the kind of labor done by him, his ability to perform a man's work, and that he had received no compensation for his labor. This evidence was inadmissible under Code, Sec. 3639. We have so held in *Peck v. McKean*, p. 19, *ante*. It is even more objectionable than the evidence which we held was rightly excluded in that case, and is clearly within the prohibition of the statute cited.

II. The court found the following facts: The plaintiff lived with the deceased from 1865, when he was about fourteen years

^{2. SERVICES: when minor cannot recover for contract.} of age, until the death of intestate in 1870. For the first two years he was under the control of a

son of decedent, who brought him to his father's home. The son died in 1867, and the plaintiff remained with the family. Other facts found are stated in the record in the following language: "From May, 1867, to December, 1870, plaintiff was engaged a good portion of the time in working on the farm of deceased and for him, in ordinary farm work, like plowing, sowing, binding, hoeing, doing chores, etc., doing generally pretty much as he saw fit, much or little; during a portion of the time he could and did make a fair hand, and received his board, clothes, washing, mending, lodging, etc., and made the house his home, and was treated in most respects as a member of the household." * * * *

"There is no evidence of an express contract that he either should or should not be paid any amount of wages, and he did not claim any while with deceased, and so far as appears affirmatively did not claim, expect or demand compensation at or before the time he rendered the services. He had a comfortable home with deceased, and was not disposed to leave, being well treated, although at times deceased desired him to leave, and at others, again, desired him to remain. He was treated as a member of the family, as far as all the circumstances justified. There is no evidence that plaintiff demanded wages until after the death of his friends, the son and father and wife, but they being gone, and the estate passing to others, and his home destroyed, he desires compensation."

From this finding of facts the following conclusion and no

Smith v. Johnson.

other must be reached: The plaintiff was a member of the family of deceased in the character of a friend, dependent or protege, and there was no express contract between plaintiff and decedent for the payment of compensation for the services rendered, and it is not shown in the record that the services were performed with the expectation, on the part of either, that they were to be paid for by the deceased. Upon these facts plaintiff is not entitled to recover. *Scully v. Scully's Ex'r*, 28 Iowa, 548; *Hartman's Appeal*, 3 Grant's Cases, 271; *Griffin v. Potter*, 14 Wend., 209; *Livingston v. Ackeston*, 5 Cow., 531; *Andrews v. Foster*, 17 Vt., 556; *Condon's Appeal*, 5 Watts & Serg., 513; *Defrance v. Austin*, 9 Pa. St., 309; *Butler v. Stone*, 50 Penn. St., 451; *Oxford v. McFarland*, 3 Ind., 156; *Morris v. Barnes*, 35 Mo., 412; *Updike v. Filus*, 2 Beasley, 151; *Davies v. Davies*, 9 Carr. & P., 87; *Williams v. Hutchinson*, 3 Comstock, 312; *Hall v. Finch*, 29 Wis., 278; *Swires v. Parsons*, 5 Watts & Serg., 357.

III. It is insisted by counsel for appellee that, as all the evidence taken in the court below does not appear in the record ^{3. PRACTICE in the supreme court: upon the law of the case applicable to the admission of evidence and the facts found.} before us, we cannot review the rulings of the court under our statute, which provides that the record need only show the rulings admitting or excluding the evidence, the purport of the evidence so passed upon, and, under our statute, the grounds of objection to the court's rulings.

IV. It is urged that the record fails to show, affirmatively, prejudice to defendant from plaintiff's own evidence, and for ^{4. — : — : error without prejudice.} this reason its admission, if erroneous, is no ground for disturbing the judgment. The evidence given by the plaintiff is material, and, if there was other proof upon the issue, added to the weight of the testimony in his behalf. In such a case the prejudice to the other party is plainly seen. If there was no other evidence for plaintiff, prejudice to de-

Parker v. Bradford.

fendants is apparent. We must, therefore, consider that the admission of the incompetent evidence shows affirmatively prejudice to defendants. The admission of incompetent evidence has been held to be error without prejudice in cases where it appears that the judgment or verdict could not have been different had the evidence been excluded; but no such ruling has been made where the evidence, held to be unlawful, constituted the whole of the proof of the party offering it, or added to the weight of the testimony in his behalf, and thus necessarily affected the decision of the case.

REVERSED.

PARKER v. BRADFORD.

1. **Bankruptcy: EFFECT OF DISCHARGE: BREACH OF WARRANTY.**
Where there was a prior incumbrance upon real estate sold with covenants of warranty, and the grantor agreed to discharge the same, but before doing so was adjudged bankrupt, and received his discharge in bankruptcy, *held*,

1. That the grantee could have proved up in bankruptcy the amount of the incumbrance, and received thereon a distributive share of the assets of the estate.
2. That he could not afterwards recover the amount thereof from the grantor, the discharge of the latter releasing him from further liability upon his covenants.

Appeal from Linn Circuit Court.

SATURDAY, DECEMBER 16.

THE plaintiff alleges that on the 30th day of June, 1871, he purchased from defendant certain real estate for the consideration of \$2,300, and that defendant executed and delivered to plaintiff a general warranty deed for the premises, and covenants that they were free from incumbrance; that there was a mortgage on the premises in favor of Ida Bradford, given on the 31st day of December, 1870, for \$1,090, with interest at ten per cent; that the mortgage was foreclosed at the September Term, 1873, of the Circuit Court of Jones county; that on the 28th day of November, 1873, the said

Parker v. Bradford.

premises were duly sold on execution issued upon said judgment for \$1,436.30 and costs, and have not been redeemed from any part of said judgment, to the damage of plaintiff in the sum of \$1,467.47.

The answer admits the material allegations of the petition, and alleges that at the time of the execution of the deed plaintiff knew of the mortgage, and required of defendant a written agreement that he would pay off the same, which agreement is as follows: "I, E. R. Bradford, hereby agree and bind myself to pay off and satisfy a certain mortgage executed by me to one Ida Bradford, December 31st, 1870, on the property known as the Kendall Parker brick building, in Anamosa, Jones county, Iowa, said mortgage being for \$1,090, at ten per cent;" that on the 26th day of April, 1873, the United States District Court for the district of Iowa duly made a decree discharging defendant from all his debts which existed on the 24th day of January, 1872; that the indebtedness alleged in plaintiff's petition existed before the granting of such discharge, was provable against the estate of defendant, and was listed in his schedule of indebtedness against his estate, of all of which plaintiff had notice.

The cause was submitted upon the following agreed statement of facts: "Bradford sold to plaintiff the undivided property named in the mortgage foreclosed, and gave therefor a warranty deed, and at the same time gave Parker a writing that he would pay off the mortgage and note. Afterwards Bradford was put into involuntary bankruptcy and got his discharge. In Bradford's schedules both the note and mortgage, and also the warranty deed and contract of Bradford to Parker, were included. Now the only question is, ought Parker to have paid or proved up his claim, or could he wait until the property should be sold, and then come on the bankrupt after being discharged?"

The court rendered judgment for plaintiff for \$1,658.90. The defendant appeals.

Griffith & Knight, for appellant.

Keeler & Keeler, for appellee.

Parker v. Bradford.

DAY, J.—When the bankruptcy proceedings were instituted Ida Bradford held against defendant a claim for \$1,090 1. BANKRUPT- and interest, secured by mortgage on the lands sold cv: effect of discharge: to plaintiff. The mortgaged lands were of sufficient value to satisfy the demand. Ida Bradford had the right to pursue one of two courses: She might release to the assignee her claim upon the mortgaged property and prove up her debt against the estate of the bankrupt, or she might retain her security and look to the land mortgaged for the payment of her debt, and waive the right to prove it up against the estate. Revised Statutes of the United States, section 5075. In either event it would be almost certain that the debt would be paid out of the mortgaged property, resulting in an actual or constructive eviction of plaintiff, and a consequent breach of the covenant of warranty. Indeed, the only thing which could prevent such a result would be the very improbable contingency of the creditor's permitting his claim to become barred by the statute of limitations. It is certain, then, that when bankruptcy proceedings were instituted the plaintiff held a contingent claim against the bankrupt, for he had his covenant of warranty, which it was not only probable, but almost certain, would be broken. Section 5068 of the Revised Statutes of the United States provides: "In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

Ida Bradford did not transfer her mortgage to the assignee, and thus she waived her right to prove up the debt against the estate. That she had elected to look to the mortgaged property for her debt must have been known before the final dividend was declared. It was then apparent that one of three things must happen: either the holder of the claim would per-

Parker v. Bradford.

mit it to become barred by the statute of limitations, and the mortgaged property thus to be discharged, or she would enforce the claim against the property, the plaintiff would pay it off, and thus have a demand against the bankrupt for the amount of the incumbrance, or upon foreclosure the property would be sold to Ida Bradford or a third party, the plaintiff would be actually evicted, and thus have a claim against the bankrupt's estate for the consideration money and interest, a much larger sum than the amount of the incumbrance.

If the plaintiff's claim had been presented for allowance the court would have been justified in leaving out of consideration the very improbable contingency that the Ida Bradford claim would be allowed to become barred by the statute of limitations, and the equally improbable contingency of the plaintiff's permitting his property to be sold for much less than its value, and then looking to the estate of a bankrupt for the consideration money and interest. The court would have been authorized to find that a contingency had happened which gave the plaintiff a claim against the bankrupt's estate to the extent of the incumbrance existing against the property conveyed to plaintiff. To that extent the claim was provable against the bankrupt's estate. Section 5119 of the Revised Statutes provides: "A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy." The claim in question does not fall within the provisions of the preceding sections referred to.

The claim, as we have seen, might have been proved against the bankrupt's estate, and his discharge in bankruptcy released him from further liability thereon. The court erred in holding the defendant liable.

REVERSED.

Addicken v. Schrubbe.

45 315
107 438

ADDICKEN V. SCHRUBBE.

1. **Pleading: JOINDER OF CAUSES OF ACTION: PARTIES.** Two parties cannot be joined as defendants in one action where a recovery is sought against one of them upon a written contract and against both upon an oral agreement.

Appeal from Winneshiek District Court.

SATURDAY, DECEMBER 16.

THE petition states that the defendants, in the firm name of Schrubbe & Bro., executed and delivered to plaintiff a certain agreement in writing which admitted the execution of certain indebtedness from the firm to the plaintiff. The defendants answered separately. One of them denied the execution of the agreement, and alleged the same was executed by the other defendant after the dissolution of the partnership. The other defendant states, in his answer, that at the time the agreement was executed there was no such firm as Schrubbe & Bro. and that said agreement was fraudulently obtained, but admits that he executed the same.

It appeared by plaintiff's testimony that, at the time the agreement was signed by one of the defendants in the firm name, the partnership was not in existence; whereupon the plaintiff offered the contract in evidence, to which defendants objected and were sustained therein by the court; whereupon the plaintiff asked and obtained leave to file the following amendment to his petition: "That defendants, while co-partners under the firm name of Schrubbe Bros., received of plaintiff, May 1st, 1866, \$140, and Sept. 1st, 1866, \$300, for which money defendants agreed to pay for the use of the same ten per cent, but said agreement was not in writing * * * ; that the claim in plaintiff's original petition is for the same identical cause of action herein set out; and plaintiff asks to recover in this suit only upon one of the counts, either that in the original petition or in this."

To the amendment to the petition the defendants answered,

Addicken v. Schrubbe.

and the trial proceeded, and resulted in a verdict against one of the defendants for \$363.28, and the other for \$167.75, and judgment was accordingly rendered. The defendants appeal.

Chas. P. Brown, for appellants.

No appearance for appellee.

SEEVERS, CH. J.—The original petition seeks to recover of both defendants, under the written contract signed in their partnership name, and the amendment thereto
1. PLEADING: joinder of causes of action : parties. seeks to recover against the same parties on an oral agreement of the partnership to repay certain borrowed money. These two pleadings should be regarded as one petition containing two counts. Such seems to have been the intent of the pleader.

While the first count or petition stood alone the court excluded the written agreement as evidence, but admitted it after the amendment was filed. We are at a loss to conceive in what way or manner the legal right to recover on the writing was changed by the amendment. It, as well as the original petition, sought a recovery against both defendants as a firm, and neither sought to charge either defendant separately, by reason of any agreement or thing done by him alone. No separate liability whatever is charged in either count of the petition.

The plaintiff claims to recover only on one of the counts, that is, either on the original petition or the amendment thereto. The court, in the instructions to the jury, recognized the right of the plaintiff to recover of one defendant on the written agreement or first count, and against the other defendant on the oral contract or second count in the petition. In this there was error. Both defendants are clearly liable on the second count, and it is so framed that such recovery can be had, while the first count seeks a recovery against both defendants and the facts proved only show the liability of one.

If the pleadings had been drafted in accord with the facts proved the first count would have shown a separate cause of action against one defendant, and the second count a cause of action against both defendants. This would have presented

Parmenter v. Elliott.

for trial a joinder of causes of action not allowed even under the Code. In this action, at least, the plaintiff cannot have a recovery against one defendant on the written contract and against the other on the oral agreement. He must elect on which; he cannot have both.

REVERSED.

PARMENTER V. ELLIOTT ET AL.

1. Practice in the Supreme Court: TIME FOR FILING BILL OF EXCEPTIONS. Where time is allowed beyond the term for settling a bill of exceptions, upon failure to file it within the time designated it will be stricken from the files upon motion.

Appeal from Linn District Court.

SATURDAY, DECEMBER 16.

THE plaintiff sues the defendants as guarantors of a promissory note for \$500, executed by the Linn County Agricultural Society, payable to Ledyard & Yeomans or bearer.

The answer admits the execution of the note and guaranty, and sets up several matters which, defendants claim, discharge them from their undertaking. There was a jury trial, resulting in a verdict and judgment for plaintiff for \$525 and costs. The defendants appeal.

I. M. Preston & Son, for appellants.

James D. Giffen, for appellee.

DAY, J.—I. The abstract shows that on the 6th day of April, 1876, the motion for a new trial was taken under ^{1. PRACTICE IN} ~~the supreme court~~ ^{time} ~~for filing bill~~ advisement by the court to be determined in vacation, judgment to be entered as of the last day of the term, and either party having the right to except and settle bill of exceptions within thirty days from filing judgment. On the 22d day of April, 1876, the court filed his ruling on the motion for new trial. On the

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24th day of May the bill of exceptitons was allowed by the judge. On this record the appellee moves that the bill of exceptions be stricken from the files because not signed by the judge within the thirty days allowed for settling the same. The motion must be sustained. Where time is given beyond the term for the settling of a bill of exceptions, it must be done within the time specified. *Lynch v. Kennedy*, 42 Iowa, 220.

II. Appellants complain of the giving of several instructions, and the refusing to give others. The bill of exceptions being stricken out we have no evidence in the record, nor any statement of any fact which the evidence tends to prove. The instructions given and those refused become mere abstractions. The abstract submitted furnishes us no means of determining that the court committed any error to the prejudice of the appellants.

AFFIRMED.

45	318
998	45
45	318
105	394

BRIGGS v. BRIGGS ET AL.

1. **Homestead: ESTATE OF DECEDENT: LIEN OF JUDGMENT.** A judgment recovered against the wife, after her homestead rights have accrued, is not a lien upon the distributive share in the estate of her husband which she elects to have set apart to her, in lieu of the homestead, after the death of her husband.

Appeal from Johnson Circuit Court.

SATURDAY, DECEMBER 16.

ON the 29th day of October, 1875, the plaintiff filed her petition, alleging, in substance, that in 1854 she became the wife of Henry C. Douglass, who, in the year 1858, became the owner of a certain eighty acres of real estate, which he and his family, until his death, in 1863, occupied as a homestead, but such homestead was never platted and recorded; that the defendants, Anna L. and Joseph W. Douglass, are children of plaintiff and Henry C. Douglass; that since the death of her

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husband, plaintiff, except for one year of temporary absence, has resided on and occupied said property as a home; that, in February, 1871, plaintiff became the wife of Albert C. Briggs, and with him and the children of her former marriage has occupied said land as her homestead, subject to the rights of said children; that her second husband has made improvements on the dwelling house of the value of two hundred dollars; that about the 11th of December, 1874, the Singer Manufacturing Company recovered a judgment against plaintiff for the sum of \$91.38 and costs; that execution issued and a levy was made on the interest of plaintiff in said lands, and the sheriff is about to sell said interest; that the indebtedness on which said judgment was rendered was contracted since her homestead rights in said property accrued.

Plaintiff asks that the one-third part in value of said premises and the improvement of \$200 thereon, made by her second husband, be set apart to her in fee simple; that one-third part in value be set apart to each of the children of Henry C. Douglass; that the part set apart to her be decreed to be exempt from the lien of the judgment aforesaid, and that the Singer Manufacturing Company be enjoined from selling the property set apart to her, or her interest in any of the premises described.

The demurrer of the Singer Manufacturing Company to this petition was sustained.

The children of Henry C. Douglass, who are minors, answered by their guardian *ad litem*.

Such further proceedings were had that the court set off to plaintiff the south 26 $\frac{1}{2}$ acres of the 80 acres described in the petition, with the dwelling house thereon; to Anna L. Douglass, 27 $\frac{1}{2}$ acres; and to J. W. Douglass, 25 $\frac{1}{2}$ acres. The court further decreed that the lien of the Singer Manufacturing Company be a lien on the share of plaintiff. Plaintiff appeals.

Fairall & Bonorden, for appellant.

Ira J. Alder and Edmonds & Younkin, for appellees.

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***DAY, J.**—The only question involved in the record is whether the interest set apart in fee, to the plaintiff, is liable ^{1. HOME-STEAD: estate of decedent: lien of judgment.} to the judgment which the Singer Manufacturing Company recovered against her. The plaintiff's husband died seized of eighty acres of land. It does not appear that the value of the property was such that more than forty acres of it could be held as a homestead. Upon the death of her husband, the plaintiff acquired the right to possess and occupy the whole homestead. Code, § 2007. She also had the right, at her option, to have the one-third part in value of all the eighty set apart to her as her property in fee simple. Code, § 2440. Such share must be so set off as to include the ordinary dwelling house given by law to the homestead, or so much thereof as will be equal to the share allotted to her. Code, § 2441. But it was incumbent upon the plaintiff to make election between possessing and occupying the whole forty acres as a homestead, and owning the one-third part in value of the eighty acres in fee. She could not, at the same time, have the forty as a homestead and her distributive share in the eighty, including the homestead. *Meyer v. Meyer*, 23 Iowa, 359; *Butterfield v. Wicks*, 44 Id., 310.

She elected to have her distributive share set apart in fee, including the dwelling house before used as a homestead. The distributive share was less in extent and less in value than the original homestead. The question is, does this distributive share, carved out of the original homestead, become liable for a debt for which the homestead was not liable? In order to determine this question we must consider what changes as to the property were effected by the election of the wife to have her interest set apart in fee. Before that, she had the right to possess and occupy, and enjoy the rents and profits of, forty acres. After that, her estate was extended as to duration, but was circumscribed as to territorial extent. She acquired a right in fee, but it was limited in extent to $26\frac{2}{3}$ acres. The $26\frac{2}{3}$ acres, however, continued to be her homestead, and will so continue as long as she occupies it as such with her family. She has

Briggs v. Briggs.

simply enlarged her tenure as to the homestead, and diminished its territorial extent. The Singer Manufacturing Company have in no way been prejudiced by this act. She had a right to possess the entire forty acres, during her life, as a homestead. If she had done so, she could not have had any portion of the eighty acres set off to her in fee, because she would have been in possession of more than one-third of its value. If, then, she had continued to occupy the forty as a homestead, she would have had no interest in the eighty which could have been subjected to the judgment of the Manufacturing Company. They are placed in no worse condition than they were in before, if their right to this lien is denied. And we are of opinion that, as the dwelling house and the 26 $\frac{2}{3}$ acres, set apart to plaintiff, have never been divested of their homestead character, no good reason can be given for permitting the judgment in question to become a lien upon them.

It is claimed, however, that the record does not show but that this debt was contracted before the homestead was acquired; and that, if so contracted, the judgment would be a lien upon the homestead, though rendered after the acquisition thereof. But it is apparent that the decision of the court below was not based upon this ground. The petition alleges that the indebtedness, on which the judgment was rendered, was contracted since the plaintiff's homestead rights in the property accrued. The Singer Manufacturing Company demurred to the petition, and the demurrer was sustained. The plaintiff refused to amend, and stood upon her petition, and judgment was therupon rendered against plaintiff, in favor of the party demurring.

The plaintiff's petition being thus held insufficient, as to the Manufacturing Company, plaintiff had no opportunity to introduce proof as to the time of contracting the indebtedness.

The cause will be remanded, with leave to the Manufacturing Company to put in issue this allegation of the petition, if so advised.

REVERSED.

Gerald v. Elley.

GERALD v. ELLY.

45	322
122	196
45	322
126	37

1. **Conveyance: covenants.** The grantor cannot escape liability upon the covenants in a deed on the ground of mistake therein when the deed expressed what both parties intended, and he was simply mistaken as to the legal effect of the instrument.
2. _____: _____: **RIGHT OF WAY.** The fact that the grantee knew of the existence of a railroad over land conveyed to him with the usual covenants of warranty, will not entitle the grantor to a reformation of the deed excepting such incumbrance from its covenants.

Appeal from Mitchell District Court.

SATURDAY, DECEMBER 16.

THE defendant conveyed to the plaintiff certain real estate, with the usual and ordinary covenants, and this action is brought thereon, the breach alleged being that the land was incumbered with the right of way to a certain railroad company.

The defendant filed an equitable answer, the material portions of which are: "That the said plaintiff, then knowing of the said right of way of said railroad company, and also knowing that a certain public road was also laid out and established, worked and traveled, across and over said premises, proposed to this defendant to exchange and give this defendant the said farm which said plaintiff then owned in said Floyd county for this said farm and land described in said plaintiff's petition; that he would exchange farms as they were with the said incumbrances thereon and subject thereto, and each party should leave the loose lumber, rails and fuel on the said farms as they were, and also a certain quantity of grain then being on each, and that this defendant then agreed to said offer, and said exchange was so made upon this agreement; that when the said deed was made and executed, by mistake and oversight it was omitted to be stated in said deed that the said premises were incumbered by said right of way of said railroad company and by said highway, and by mistake and oversight he omitted to state or cause to be stated in said deed

Gerald v. Elley.

that the general covenants therein that said premises were free from incumbrances should not operate as against said incumbrances of said highway and said right of way of said railroad company, as it should have done to express the real terms of said agreement and the understanding of the said parties thereto; that at the time the said deed to said plaintiff was executed, the plaintiff was not present, and had no knowledge of any instructions or orders given to the conveyancer who drew up and wrote out said deed, and knew nothing of its contents until some days afterward, when the same was delivered to him by said defendant; that said plaintiff, then well knowing that said deed did not express the true contract between the said parties, and that said deed was a deed of full covenants against all such incumbrances, and that said deed should have specified that the covenants therein did not operate to cover the incumbrances of said highway and said railroad company, and that he fraudulently concealed said knowledge from the defendant, and fraudulently accepted the same, and now fraudulently seeks to enforce the covenants therein."

Defendant asked that the deed be reformed, and for general relief.

The reply denied the allegations in the answer, and there was a trial of the equitable issue to the court. There was a finding for the defendant and a decree granting the relief asked in the answer, and plaintiff appeals.

L. M. Ryce, for appellant.

D. W. Poindexter, for appellee.

SEEVERS, Ch. J.—The answer does not state that these parties agreed or contracted that the incumbrances should be exempted from the operation of the covenants.
1. CONVEY-
ANCE: cove-
nants. In fact, nothing was said by either party in reference to this matter. The legal effect of a deed of the character of the one in question was not considered or thought of, by the defendant at least. He was asked this question during his examination as a witness: "You knew the railroad was there, but did you know it was an incumbrance such as you

Gerald v. Elley.

would have to defend against or make good?" To this he replied: "No, sir; I did not. I did not understand your former question in regard to it. I did not understand that it was, or I certainly should have done it." From this it is apparent the deed contains just what the defendant intended.

There was no mistake made by the draftsman. It is clear the defendant was mistaken in the legal effect of the covenants in the deed, but we are unable to see there was any mistake of fact, or that the deed was not drawn in accord with what both parties intended.

Conceding that the plaintiff knew of the incumbrance, and that he traded his farm for that of the defendant, this would not make the legal effect of such a contract in anywise different from what it would be if the plaintiff had paid five thousand dollars in cash. The question is, did these parties contemplate the incumbrance, and *contract or agree* that it should be excepted from the operation of the covenants? We feel constrained to say that under the allegations in the answer, and the evidence, we are compelled to answer this question in the negative.

There is nothing different shown in the testimony from the very common case where a party sells and conveys land on ~~2. —: —:~~ which there is located a railway, the existence of ~~right of way~~ which was known to the other party, and the premises are conveyed with the usual covenants without excepting such incumbrance therefrom. In such case there can be no relief because of the grantor's negligence, or his want of legal knowledge. There is no mistake of fact in such case.

The judgment of the District Court must be reversed, and the cause remanded with directions to dismiss the equitable answer, and to proceed with the trial of the action at law.

REVERSED.

The State v. White.

THE STATE v. WHITE.

1. **Criminal Law: ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER.**
An assault with intent to commit manslaughter is included in an assault with intent to commit murder, and an indictment for the latter offense will sustain a conviction for the former.

Appeal from Dubuque District Court.

45	325
83	402
45	325
87	143
45	325
100	4
45	325
120	246

SATURDAY, DECEMBER 16.

THE defendant was indicted for the crime of an "assault with an intent to commit murder," and was convicted of an "assault with intent to commit the crime of manslaughter," and thereon was sentenced to a term of imprisonment in the penitentiary. He appealed to this court.

Pollock & Shields, for appellant.

M. E. Cutts, Attorney General, for the State.

BECK, J.—An opinion was filed, at the Davenport October term, 1875, in this case, reversing the judgment of the District Court. Thereupon the Attorney General, within the time prescribed by the rules of this court, filed a petition for rehearing, which was allowed, and the cause was again submitted upon the re-argument. At the following December term, the cause was again before the court for decision, and a conclusion was reached, concurred in by all the Justices then occupying the bench, contrary to the opinion before filed, and it was then decided that the judgment of the District Court be affirmed. The cause was assigned to one of the Justices, who, soon thereafter, ceased to occupy a seat on this bench, for the preparation of an opinion in accord with our decision. This, however, he was unable to do before the expiration of his term of office, and with others this case stood for re-assignment at the first meeting of the court as it is now organized. Through some oversight the cause was not re-assigned, and,

The State v. White.

for that reason, escaped our attention until our last term. Upon another consideration by this court, as now constituted, we have unanimously reached the conclusion, agreeing with the decision upon the re-argument, that the judgment of the District Court ought to be affirmed.

Under the rules of this court, opinions, in causes wherein petitions for rehearing are filed, are not to be published in the Reports until the final disposition of the petition for rehearing, or the decision of the cases upon re-argument. Through another oversight this rule was not observed in this case, and the opinion found its way into the Reports. See 41 Iowa, 316.

We will briefly consider the only question involved in the case. Counsel for defendant insist that the conviction for an ^{1. CRIMINAL law : assault with intent to commit manslaughter, upon with intent to commit man-slaughter.} assault with intent to commit manslaughter, upon with intent to commit man-slaughter. murder, is erroneous. This position presents the point we are called upon to decide.

Code, § 3872, prescribes the punishment for the crime of an assault with intent to commit murder. Sections 3874 and 3875 provide for the punishment of an assault with intent to maim, rob, steal, to commit arson and burglary, and to inflict a great bodily injury. No other provisions are found for the punishment of assaults with intent to commit crimes, specifying such offenses by name. But § 3876 is in these words: "If any person assault another with intent to commit any felony or crime punishable by imprisonment in the penitentiary, where punishment is not otherwise prescribed, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year."

The following sections of the Code must be considered in determining the question before us:

"Sec. 4465. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the offense charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense, if punishable by indictment.

"Sec. 4466. In all other cases the defendant may be found

The State v. White.

guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment."

Under section 3876, an assault with intent to commit manslaughter may be indicted and punished.

Murder is the felonious killing with malice. Manslaughter is the felonious killing without malice. The crime of manslaughter is not a degree of the crime of murder, but is a distinct offense, included in the crime of murder. Under section 4466, one indicted for murder may be convicted of manslaughter. These positions are too apparent to demand arguments in their support. The same conclusions must follow in regard to the offenses of assaults to commit these crimes. An assault with intent to commit murder covers the intent to unlawfully kill with malice. An assault with intent to commit manslaughter includes only the intent to kill unlawfully without malice. The intent to kill unlawfully without malice is necessarily included in the intent to kill unlawfully with malice. Remove the ingredient of malice in the last case and you have the first. It follows that, as an assault with intent to commit manslaughter is necessarily included in an assault with intent to commit murder, one indicted for the last crime may, under section 4466, be convicted of the first.

These views are supported by the following cases, which are directly in point upon this question. *State v. Butman*, 42 N. H., 490; *State v. Waters*, 39 Me., 54; *State v. Phinney*, 42 Id., 384; *State v. Nichols*, 8 Conn., 496; *Beckwith v. The People*, 26 Ill., 500; *People v. Kennedy*, 5 Cal., 133; *People v. English*, 30 Id., 214; *People v. Congleton*, 44 Id., 92; *State v. Reid*, 40 Vt., 603; *Wall v. The State*, 23 Ind., 150.

In *The State v. Jarvis*, 21 Iowa, 45, this court held that an assault with the intent to commit murder necessarily included a simple assault, and, under section 4466, which is section 4836 of the Revision of 1860 and section 3039 of the Code of 1851, a prisoner indicted for the first named crime could be convicted of the offense last mentioned. If, upon an indictment for an assault with intent to commit murder, a prisoner may be convicted of an assault simple, on the ground it is included in the crime alleged in the indictment, it follows that assaults

Mahaska County v. Ruan.

of a higher degree of criminality are also included in the offense charged, for which there may be convictions.

The judgment of the District Court is

AFFIRMED.

MAHASKA COUNTY V. RUAN ET AL.

1. **County Auditor: LIABILITY OF SURETIES: COMPENSATION OF.** The sureties upon the bond of a county auditor are liable for any overdrafts he may have made by issuing warrants payable to himself and receiving from the treasurer the amount thereof, in excess of the compensation allowed him by the board of supervisors.
2. **— : — : SCHOOL FUND JUDGMENT.** The auditor is not authorized to receive money collected upon judgments in favor of the school fund, and his sureties are not liable for an amount thus collected and paid by the clerk to the auditor.
3. **Practice in the Supreme Court: INTERLINEATION IN ABSTRACT.** Where there is a written interlineation in the petition set out in the printed abstract, without which the finding of the court below could not be sustained, it will be presumed, in the absence of any showing to the contrary, that the abstract as amended is correct.

Appeal from Mahaska District Court.

SATURDAY, DECEMBER 16.

THIS action was brought to recover of the defendant, Ruan, as county auditor, and of his sureties, for rents collected and belonging to the county, for costs paid him in road cases, for overdrawing his salary, for money received by him of the clerk of the District Court as the amount of a school fund judgment, and for copies of the Code received by him and not accounted for.

The District Court found that the defendants were liable for the sum of \$302.92 for rents collected; \$100 for costs in road cases; \$150 for overdrawing salary; \$655.05 for money received on school fund judgment, and \$168 for copies of the Code. Judgment for plaintiff. M. Crookham and other sureties appeal.

Mahaska County v. Ruan.

Crookham & Gleason, for appellants.

M. E. Cutts, for appellee.

ADAMS, J.—I. Ruan's salary was fixed by the board of supervisors at eighteen hundred dollars per year. For 1872 he drew thirteen orders on the county treasurer for \$150 each, which orders were paid, amounting to nineteen hundred and fifty dollars, being one hundred and fifty dollars in excess of his salary. It is contended by the appellants that they are not liable as sureties for such overdraft, and they place their exemption upon the ground that the money was not received by Ruan by virtue of his office. But we think that this position cannot be maintained. Ruan was authorized by law to sign orders; the record shows that he drew the money upon such orders. The treasurer was not in fault in paying them.

II. Were Ruan's sureties liable for the money received by him from the clerk of the District Court on the school fund judgment? We think not. Section 1867 of the Code provides that, "when any person desires to pay either principal or interest due on the school fund he shall obtain a certificate from the county auditor specifying the amount due from such person to the school fund, stating whether it is principal or interest, or both * * * * upon the presentation of which certificate to the county treasurer shall receive the amount so specified."

From the foregoing section it appears that, although the auditor may have charge of the school fund notes, it is not his duty to receive money thereon, but it is made expressly the duty of the county treasurer. If he may not receive money upon school fund notes we see no reason why he should upon a school fund judgment.

Some stress seems to have been laid by the plaintiff upon a resolution passed by the board of supervisors, and which is in these words: "Resolved, that the auditor is directed to furnish the county attorney with a list of persons indebted to the school fund of this county and whose notes are past due, and

Mahaska County v. Ruan.

that said county attorney is hereby directed to bring suit against all delinquents."

We are unable to see how authority to furnish the county attorney a list of the persons indebted to the school fund gave authority to receive money on the judgments which might be obtained against such persons. The authority to furnish a list of the delinquents would hardly furnish as strong an implication of authority to receive the money which might be collected as the custody of the notes; but that Ruan already had, and it is not claimed that any authority was derived therefrom. In our opinion, the money was received without authority and no recovery can be had against Ruan's sureties therefor.

III. It is claimed by appellants that the court erred in charging Ruan with so many copies of the Code. It is said ^{3. PRACTICE in} that he was held liable for more than the petition ^{the supreme court: inter-} shows that he received. On this point we have ^{lineation in abstract.} to say that the petition, as set out in the abstract, appears to be amended by an interlineation with a pen. As the finding of the court would not have been justified unless the allegation in the petition was such as is shown in the abstract as amended by the interlineation, we will, in the absence of any showing to the contrary, presume that the abstract as thus amended is correct.

Some other errors were assigned by appellants, but no others being discussed in their brief we regard them as waived.

The sum of \$655.05, allowed for money received on the school fund judgment, should be deducted from the judgment rendered against the appellants, and the plaintiff should have judgment only for the balance.

MODIFIED AND AFFIRMED.

SEEVERS, Ch. J., having been of counsel in this case, took no part in its determination.

Collar v. Ford.

COLLAR v. FORD.

45 381
d92 206

1. **Vendor and Vendee:** FRAUD: CONSIDERATION. Inadequacy of consideration will not of itself establish fraud in procuring a conveyance of land, but may be considered with other circumstances.
2. _____: _____: PRINCIPAL AND AGENT. The fact that one was requested to ascertain and report to the owner, who lived in another State, the amount of taxes due on a piece of land, which he did, did not constitute him an agent with respect to the land so as to charge him with fraud in buying the same himself for less than its actual value.
3. _____: _____: _____. An agent for the sale of land will not be charged with the duty of informing his principal of the value of the land in direct negotiations for its purchase by himself. When he becomes the buyer and the principal the seller, his agency with respect to the property ceases.

Appeal from Chickasaw District Court.

SATURDAY, DECEMBER 16.

ACTION to cancel a deed on the ground that the same was obtained by fraud. The facts are stated in the opinion. Decree for plaintiff. Defendant appeals.

*Ayers & Shaver, for appellant.**Potter & Hanan, for appellee.*

ADAMS, J.—To establish fraud the plaintiff relies to some extent upon the difference between the value of the land and ~~1. VENDOR and vendee: fraud: consider-~~ the price which the defendant paid for it. The quantity of land is eighty acres. The amount ~~eration.~~ paid by defendant was \$58.94, including the taxes which were due on it. As to the value, the witnesses differ greatly; they estimate it from \$240 to \$600. Great as was the difference between the value and the price paid, this fact alone would not show fraud. It is a circumstance which may be considered with other circumstances.

The trade in this case was made by letters, and the letters with one exception are before us. One letter it is alleged is

Collar v. Ford.

lost, but its contents are testified to by plaintiff, and we will take his statement as true.

The land in question is in Chickasaw county. The defendant at the time of his purchase resided in that county; the plaintiff resided in Michigan. One N. H. Collar, uncle of the plaintiff, was residing in Clayton county. Just prior to the transactions which resulted in a sale to the defendant, to-wit: in 1868, said N. H. Collar was written to by the plaintiff to go to Chickasaw county and redeem the plaintiff's land from a tax sale. Said N. H. Collar was then out of health, and meeting the defendant, Ford, an old acquaintance of his, and resident of Chickasaw county, he engaged him to visit Hampton, the county seat of Chickasaw county, and ascertain the amount necessary to redeem the land from tax sale, and inform him by letter. Nothing at that time was said about Ford's acting as agent, farther than above set forth. Ford went to Hampton and ascertained that the land was sold for taxes two years before. This he reported in a letter to N. H. Collar, under date of Nov. 27, 1867, and among other things he said: "As your brother (meaning plaintiff, who was nephew instead of brother to N. H. Collar) lives at a distance, if he wishes me to see to it (the land in question), I will do as he may direct if I can. If he wants the taxes settled up and kept paid I will do it; or if he wants to sell it, let him set his price, and I will help him sell it if he should wish me to do so. The land don't lay where I understood you to say; it is further north, and on the same side of the road that Schoonover's is." This letter N. H. Collar forwarded to the plaintiff, having written on it as follows: "He (Ford) says that the land is on the same side of the road that Schoonover's is on. I thought it was on the north side and Schoonover's on the south. What say you? If it is on the south it is on the flat wet land." The letter written by Ford to N. H. Collar, and forwarded by him to plaintiff, was answered by plaintiff Feb. 2, 1868. In it plaintiff says: "My uncle, Newton H. Collar, sent me the letter you wrote him concerning my land. It seems that it lays on the south side of the road; the land that we looked at was on the north side. If you think that you can take the matter in

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hand and make anything more than expenses, you may; if not, let it go. The land is so far off that I do not wish to be at any more expense about it. The land cost me \$230; now, if you could get \$25, \$50 or \$100 out of it, it would come very acceptable. Your letter was dated Nov. 27, 1867, but it did not reach me until about the middle of last month." Ford wrote immediately to the plaintiff, offering \$25, and the plaintiff answered accepting his offer. Prior to the time that the plaintiff wrote Ford offering to sell for \$25, \$50 or \$100,
^{2. — : —} Ford had received no authority to act as agent in principal and agent. selling the land; he had been simply employed by N. H. Collar to ascertain and report the amount necessary to redeem from tax sale. Whatever representation he made about the location of the land was volunteered. As to the quality he said nothing. The statement about its being wet land was made by N. H. Collar, and without Ford's knowledge. All that Ford said was that the land was farther north and on the same side of the road that Schoonover's was. By its being farther north it appears that he meant that it was farther north than Schoonover's. The representation by which plaintiff says that he was misled is that the land was on the same side of the road that Schoonover's was; in this, if anything, consists the fraud. Schoonover's was on the south side, and N. H. Collar wrote plaintiff that the land on the south side was wet.

Ford's statement in regard to the location of the land was not in our opinion fraudulent; he had not at that time been upon the land; he had been upon a farm which cornered on it; he might have been simply mistaken as to how the road ran. As to its being farther north than Schoonover's, what he said about it was true. It is in section 18, and Schoonover's is in section 20 in the same township, and it will be observed that sections 18 and 20 corner, the south line of 18 being an extension of the north line of 20. As to its being on the south side of the road, his statement was partially true; about half of it was on the south side. The road running from Schoonover's towards the land bore north of west, but when it struck the plaintiff's land it turned and ran south of west; had it contin-

Collar v. Ford.

ued in a straight line it would, we may presume, have brought nearly all the land south of the road. Notwithstanding the road turned and ran south of west across the plaintiff's land, it brought about half of it south of the road. There is no evidence that defendant knew that it was not all south until after he bought; nor is there any evidence that he knew that the land was wetter on the south than north side. On the other hand, the evidence tends to show that the land on the south of plaintiff's was not in fact wetter, but dryer. One of the witnesses testified that the land in question was wetter than the land east or south of it. According to this testimony the true location was less favorable than that given it by Ford. Had the land been altogether south of the road it would, according to this testimony, have been dryer than it was; this shows that Ford's representation in regard to location was not fraudulent. It is true that if by his wrong representation, and N. H. Collar's error, combined, the plaintiff had been led into a mistake, and if the mistake was material, a court of equity might grant him relief upon that ground. But we think that the evidence shows that the mistake, if any, was not material; at least we are not satisfied that it was, and the burden is upon the plaintiff.

The plaintiff read in evidence the deposition of one Dunlap. He testifies that Ford told him, after boasting that he had made several hundred dollars in the trade, that the plaintiff wrote to him to go and see the land, and see what it was worth and write him, and that he reported to the plaintiff that the land was worthless. If Dunlap was not mistaken, we should have no doubt that the plaintiff was defrauded. But it appears that he was mistaken. If Ford made such a report to the plaintiff, the plaintiff knew it. Now, the plaintiff was himself a witness, and was examined closely as to what communications he received from Ford, and what induced him to sell the land so cheap. He undertakes to show what communications he received from Ford, but he testifies to no such communication as Dunlap says that Ford admitted that he made. If, then, the plaintiff, who was in a position to know

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all about it, did not believe that he received any such communication, he cannot ask us to believe it.

We come now to consider the contents of the letter which the plaintiff says that he received from Ford, but which is now lost. The plaintiff, testifying in regard to the letter, says: "It stated that it lay south of the land I supposed I had bought, as was stated in the letter to N. H. Collar; that it was low, wet, what they call a slough, if where he described it; and said not more than half of it could be plowed." It will be seen that what is said about its being a slough is not Ford's language, but rather the witness' argument. Aside from location, what Ford appears to have said about it was that it was low and wet, and that not more than half of it could be plowed. Was this statement fraudulent? It was not if it was true. As to the character of the land we have the testimony of six witnesses. One says that it was wet, and he does not think that more than half of it could be broken that spring. Another says that it was mostly flat; probably two-thirds of it. Another says full one-half of it is rather wet for cultivation; wetter than the lands around it; rather wetter than the land east or south of it. Another says that part of it is as lands will average there, and part is slough. Another says it is rather a low, wet, flat piece of land. Another says that it is a pretty wet piece of land; he should judge about half of it very wet.

If these statements are compared with the statement which the plaintiff says that Ford made in regard to the character of the land in the letter that is lost, it will appear that Ford's statement was substantially true; at any rate, that the land was not any better than he represented it.

But it is said that Ford was the plaintiff's agent, and was under obligation to disclose to him the true value of the land.

3. — : To this it may be said, that it does not appear that the plaintiff sought from him any such information. In the first letter which he ever wrote Ford he fixes a price at which he is willing to sell, and in the same letter he shows that he had himself been in the same neighborhood, and had at least a general knowledge in regard to the lands.

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As to his land, he may have been misled slightly in regard to its location. He may have been led to think that it was all south of the road, when only about half of it was. But we are now satisfied that he was not misled to his injury, because if it had been farther south it would, according to the testimony of one witness, have been dryer land. Besides, he had substantially accurate information in regard to its character. He had learned from Ford that about one-half was wet and one-half arable. With this knowledge, he fixed his own price without any further inquiry. It is true he fixed it indefinitely. He said in his letter to Ford: "If you could get \$25, \$50 or \$100 out of it, it would come very acceptable." Ford, without any further representations or communication in regard to the character or value of the land, offered to give the plaintiff \$25, and the plaintiff immediately accepted the offer. Ford was to take the land subject to the taxes. (Was Ford under obligation to tell the plaintiff that the land was worth more? We can conceive of a code of morals so sublimated as to require that every purchaser should disclose to the seller the value of the property, if he knows its value and the seller is ignorant of it; but that is not the law.) "The seller of an estate must be presumed to be desirous of obtaining as high a price as can be fairly obtained, and the purchaser must equally be presumed to desire to buy at as low a price as he may." Story on Agency, section 210.

In the terse language of the civil law, it is said: "The buyer buys for the least possible; the seller sells for the most possible."

While an agent employed to sell the property of his principal is charged with the duty of obtaining the highest price he can fairly get; yet if he himself becomes the purchaser, and the principal the seller, he is under no obligation to assist the principal to obtain the highest price he can. The moment he becomes the buyer and the principal the seller, the agency in relation to that property ceases. The parties deal with each other, as it were, at arms length. This is necessarily so. It being the buyer's right to buy the property for the least he

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can, he cannot be charged with the duty of aiding the seller to obtain the most he can.

If a person purchases property for less than its value by reason of a false representation made by him, upon which the seller rightfully relied, that would be ground for avoiding the sale. If, at the time of the representation, he was employed to sell the property, the case would be different. In such case the agency might constitute the ground of rightful reliance upon the representation. But we have seen no case, and we venture to say that none can be found, in which it has been held that a person who has been charged with the duty of selling property as an agent, and has made no false representation in regard to the property, if he lays aside the character of agent and negotiates directly for the purchase of the property himself, is bound to disclose to the owner the value of the property and see to it that he obtains a full price.

The plaintiff's trouble arises from the fact that he had become unnecessarily discouraged about his property. In his first letter to Ford, he said: "If you think you can take the matter in hand and make anything more than expenses, you may; if not, let it go. The land is so far off I do not wish to be at any more expense about it."

After he sold the land to Ford he discovered that he sold it for a very inadequate price, and now he comes into a court of equity and asks to be relieved from his foolish trade.

We are unable to discover under what rules of law the relief which he asks can be given.

REVERSED.

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THE CITY OF COUNCIL BLUFFS V. THE KANSAS CITY, ST. JOSEPH
& COUNCIL BLUFFS RAILROAD COMPANY.

| 51 228 |

1. **Railroads: what constitutes a transfer.** The term "transfer," as employed in section 1310 of the Code, refers to the act of removing freight, passengers and express matter, and is intended to cover the removal of cars, with their burdens, from one road to another, as well as the change of their burdens from the cars of one company to those of another.
2. ——: **CONSTITUTIONAL LAW: REGULATION OF COMMERCE.** Any regulation of the transportation of goods from one State to another, upon railroads, operates as a regulation of commerce, and a statute prescribing such a regulation is unconstitutional and void.
3. ——: ——: ——. Sections 1310-1316, inclusive, of the Code, requiring railway companies connecting with the Union Pacific Railway to transfer their freight, passengers and express matter at Council Bluffs, is in conflict with the Acts of Congress, approved, respectively, July 1, 1862, and June 15, 1866, and cannot, therefore, be enforced.
BECK, J., *dissenting*.
4. ——: ——: **AUTHORITY OF STATE.** While the State may regulate the time or manner of making transfers of the subjects of commerce transported by railway carriage, between points within its own limits, it cannot impose any burden upon transportation between points lying in different States. BECK, J., *dissenting*.
5. ——: **OCCUPATION OF STREET: CONTRACT.** Since a railway company has the right to occupy the streets of a city with its track, without the consent of the municipal authorities, the city cannot impose conditions upon the railway company by an ordinance granting the right of way, which shall be binding upon the company upon its use of the street and create an obligation for the performance of the conditions.

Appeal from Pottawattamie Circuit Court.

THURSDAY, OCTOBER 20.

ON the 4th day of August, 1874, the plaintiff filed its petition in the Circuit Court of Pottawattamie county, praying that the defendant be restrained and enjoined from transporting, delivering and receiving, to and from the Union Pacific Railroad Company, any passengers, freight or express matter at any other point than at the terminus of the defendant's

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railroad within the city of Council Bluffs, and also, "from making any transfer of freight, passengers and express matter to or with any other railroad company, either by delivering or receiving the same at any other place than in this State, at or near the terminus of its railroad in the city of Council Bluffs," and "from operating its railroad to or from any point, other than its terminus within the limits of Council Bluffs," and, likewise, from in any manner violating its alleged contract with the plaintiff "in relation to defendant operating its road within the corporate limits of the city of Council Bluffs, by running its passenger and freight cars beyond its terminus within the corporate limits of the city of Council Bluffs, near the city of Omaha, without the boundaries of the State of Iowa, at a point near the city of Omaha, within the State of Nebraska."

The petition also prays that by proper decree the defendant be required specifically to perform the terms, conditions and provisions of said contract, as set out in an ordinance of the city of Council Bluffs, which is as follows:

"Section 1. *Be it ordained by the Common Council of the city of Council Bluffs,* That it shall be lawful, on or before the first day of June, 1872, for the Kansas City, St. Joseph & Council Bluffs Railroad Company to lay a single track roadway along the north side of Commercial street, from the east side of Baldwin street west to the intersection of Commercial street with the plat of ground known as the Union Pacific Transfer Grounds.

"Sec. 2. In the construction of said railway track, the center of it shall not be more than ten feet from the center of said Commercial street, and shall conform, as near as possible, to the grade established, or which may be hereafter established, as the grade of Commercial street.

"Sec. 3. Said railroad company shall make, and keep in repair, safe and convenient crossings at the intersection of Commercial street with other streets, along said right of way, and not obstruct natural or artificial waterways.

"Sec. 4. Said railroad right of way is hereby granted to enable said company to pass their trains from their present

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depot, on Bancroft street, to the Union Transfer & Depot Buildings within the corporate limits of the City of Council Bluffs; and, should said Council Bluffs, Kansas City & St. Joseph Railroad Company, their successors or assignees, seek, at any time hereafter, to transfer their freight or passengers on their east and west bound trains, beyond the corporate limits of the city of Council Bluffs, then all rights and privileges hereby granted shall be forfeited by said railroad company, and revert to the city; provided, further, this grant shall not be deemed exclusive, but the city shall, at all times, have the right to use the said Commercial street as may be deemed requisite in laying down gas pipes, sewerage pipes, or constructing ditches for the drainage of the city.

"Sec. 5. This ordinance to take effect and be in force from and after publication, according to law, at the expense of said Kansas City, St. Joseph & Council Bluffs Railroad Company.

"Approved March 2, 1872."

The petition alleges that defendant accepted the conditions and terms of this ordinance and constructed its road upon the streets named therein; that the ordinance was passed in order to grant to defendant the right of way to enable it to extend its road to the transfer grounds of the Union Pacific Railroad Company within the city, which was necessary for the more convenient transfer of freight and passengers from one road to the other. Prior to the passage of the ordinance, defendant's railroad had been completed and was in operation to a point within the corporate limits of the city of Council Bluffs.

It is alleged that, in violation of this ordinance and the alleged contract existing between the parties by virtue thereof, and of the laws of the State of Iowa, the defendant does transfer and deliver passengers and express matter at a point beyond the corporate limits of the city of Council Bluffs, and beyond the limits of the State, and within the limits of the city of Omaha, in the State of Nebraska, and that passengers and express matter are transferred to defendant's road at the same point, and, likewise, that the defendant is running and operating its freight and passenger trains

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to the city of Omaha, and there transfers passengers, freight, and express matter to the Union Pacific Railroad Company, and also receives passengers, freight and express matter from said railroad, and other railroads.

The following act of the General Assembly of Iowa was passed and duly published February 29, 1872 (see Chap. 6, Laws of 1872; Code, Secs. 1310, 1311, 1312, 1313, 1314, 1315 and 1316):

"AN ACT Requiring specified Acts and Duties of Railroad Companies, and providing certain Remedies for the Enforcement of the same.

"Section 1. *Be it enacted by the General Assembly of the State of Iowa,* That all railroad companies, their successors, assigns, or lessees, that have been, or may hereafter be, incorporated under the laws of the State of Iowa, that operate, or may hereafter operate a line of railroad in this State, terminating at or near the city of Council Bluffs, in the State of Iowa, and making a connection with any railroad, which, either by its charter or otherwise, extends to a point on the boundary, or within the limits, of the State of Iowa, be and they are hereby prohibited from making any transfer of freights, passengers or express matters, to or with any other railroad company, at or near such terminus—either by delivering or receiving the same—at any other place than in the State of Iowa, at or near the said point at which the said railroad, extending to the boundary of the State of Iowa, terminates.

"Sec. 2. Every railroad company, its successors, assigns, or lessees, which, by its charter or otherwise, has its terminus at any point on the boundary or within the limits of the State of Iowa, or which has authority to bridge or ferry the Missouri river, for the purpose of having a continuous line of its road, and for connecting with other railroads in the State of Iowa, is hereby prohibited from making any transfer of freights, passengers or express matters to, or with, any other railroad company, either by delivering or receiving the same at any other place than in this State, at or near its legal terminus; and every such company, extending to the boundary, or within the State of Iowa, or having the authority to bridge or ferry

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said Missouri river, shall erect and maintain at or near its legal terminus, within the limits of the State of Iowa, all its depots, stations, and other buildings necessary for such transfer.

"Sec. 3. Every railroad company, its successors, assigns, or lessees, which has heretofore made, or which shall hereafter make, any contract with any municipal corporation in this State, is hereby prohibited from, in any manner, violating any of the provisions of such contract; and every railroad company, its successors, assigns, or lessees, which has heretofore made, or which shall hereafter make, any contract with any municipal corporation in this State, is hereby required to perform each and all of the provisions of any and every such contract, specifically as agreed therein, and it is hereby made its duty so to do. In every case in which any such municipal corporation has complied with its obligation relating to such contract at any stage of the progress of its fulfillment, so far as it has agreed to do, such municipal corporation shall not be required to furnish any further tender or guarantee of compliance on its part, in order to secure its rights in the courts; but in case anything remains to be done by such municipal corporation under such contract, after the completion of the same on the part of the railroad company contracting therewith, then it shall, after the enforced compliance on the part of such company as hereinafter provided, be required to fully comply on its part.

"Sec. 4. In case of a refusal of any railroad company, its successors, assigns or lessees, to comply with the provisions of section one of this act, or its failure to perform the duties required in the last preceding section, or their doing, or having done, any act at variance with such performance or duties, then the municipal corporation affected thereby, or with which the contract in that particular case was made, may, in an action by *mandamus*, in any court of record in the county in which such municipal corporation is situated, proceed against such company so failing or refusing, and such company shall, on proper proof, be required by such court to perform all the duties required by this act; and the general law for the action

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of *mandamus*, in force in this State, shall apply in such a case with the same force that it does in all other cases in which it is applicable, except as it is herein enlarged.

"Sec. 5. In case any municipal corporation, affected as before stated, or with which any such contract has been made, should not desire to seek the remedy given in the last preceding section of this act, it may proceed in equity by the action of specific performance, in any court in the county in which such municipal corporation is situated, having jurisdiction in equity, and in case such court should find that a contract had been made, it shall, by decree, require such company so violating, or offering to violate its contract, or failing or refusing to perform the provisions thereof, to specifically perform the same.

"Sec. 6. Any court or judge, in this State, to whom application shall be made, shall, at the suit of any municipal corporation, as aforesaid, restrain, by injunction, the violation of any provisions of this act, or the provisions of any contract as aforesaid; and in such proceeding, it will not be necessary for such municipal corporation to give a bond.

"Sec. 7. The remedies provided for in this act shall not be construed to be exclusive.

"Sec. 8. Any order, decree or judgment, made by any court, in pursuance of any of the provisions of this act, shall be enforced in the usual manner.

"Sec. 9. The words "railroad company, or companies," in this act, shall be construed to mean, also, the officers, agents, or employes of such company or companies."

The defendant answered the petition by setting up, among other things, that the terminus of its road is within the city of Council Bluffs, where it connects with the Union Pacific Railroad, at a point known as the Union Pacific Transfer Grounds. It denies the alleged agreement, claimed under the city ordinance, that it was to transfer its passengers and freight as alleged in the petition, and alleges that no contract on that subject is embodied in the ordinance which became binding upon acceptance by defendant of its terms and conditions; that under the laws of the State it had the right to construct its

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road upon the streets occupied by it without the consent or action of the city as shown by the ordinance.

The answer further denies that the defendant transfers passengers, freight, or express matter, as alleged, to the Union Pacific Railroad, or to any other railroad at Omaha, and runs its trains to that city. The other averments of the answer need not be stated.

On the 19th day of October, 1874, plaintiff moved for a temporary injunction, as prayed for in the petition. The motion was supported by affidavits, and resisted by counter-affidavits. On the 22d day of the same month the writ was allowed. From this order defendant appeals to this court.

Sapp & Lyman, for appellant.

Montgomery & Scott, James, Aylesworth & Mynster and *G. A. Holmes*, City Attorney, for appellee.

MILLER, Ch. J.—I. The evidence submitted to the Circuit Court establishes the fact that passenger and express cars used upon appellant's road were, prior to the allowance of the injunction, in the westward bound trains run across the river to Omaha, without any transfer of their burdens being made at the western terminus of appellant's road at Council Bluffs. Its eastward bound trains of passenger and express cars received their passengers and express matter at Omaha, and there was no change of cars at the western terminus of appellant's road in Council Bluffs. The cars of defendant were drawn to and from the terminus of its road over the bridge spanning the Missouri river by the engines of the Union Pacific Railroad Company, or by the engines of a transfer company, whose business, it appears, is to transfer passengers, freight and cars from the transfer grounds in Council Bluffs across the bridge to the depot of the Union Pacific Railroad in Omaha. Both the petition and answer state the eastern terminus of the Union Pacific Railroad to be within the corporate limits of Council Bluffs, at a point known as the "Union Pacific Transfer Grounds," which is also the western

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terminus of appellant's railroad. From this point to the depot of the Union Pacific Railroad in Omaha, the cars of defendant with their burdens were transported across the bridge as above stated. It thus appears that the passengers and express matter transported by the defendant were not transferred from and to its cars at Council Bluffs, but were carried in the cars of defendant to and from Omaha. The plaintiff insists that the acts of the defendant in permitting its cars to be thus drawn to and from Omaha as above stated are in violation of the provisions of chapter 6 of the Laws of the Fourteenth General Assembly, prescribing "the duties of railroad companies having *termini* at or near Council Bluffs," and also in violation of an alleged contract between the plaintiff and the defendant by virtue of the ordinance of the city granting the right of way for its road upon certain streets and its occupancy thereof under the ordinance. On the other hand, the defendant maintains that the statute referred to is in conflict with the Constitution of the United States, inasmuch as the State thereby attempts to regulate, interfere with and control commerce among the States, and that the city ordinance imposes no obligation on defendant, in the nature of a contract, to transfer passengers and freights within the city, as it possessed the right, under the laws of the State, to occupy and use such streets with its railroad, without the assent of the city and free from the restrictions and conditions imposed by the ordinance. The case is thus made to present questions involving the validity of the statute of the State above mentioned, and the effect of the city ordinance, which, it is claimed by plaintiff, is violated by the acts complained of in the petition. We will proceed to the consideration of these questions.

The first three sections of the statute in question prescribe the duty of the railroad corporations contemplated therein. The first section applies to railroad companies incorporated under the laws of the State, roads which operate their lines in this State terminating at or near Council Bluffs and making connection there with any railroad extending to a point on the boundary or within the State of Iowa; the second

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applies also to railroad corporations not organized under the laws of this State, which have constructed railroads terminating within the State, "or which have authority to bridge or ferry the Missouri river, for the purpose of having continuous lines of their road, and for connecting with other railroads of the State of Iowa." Those corporations contemplated in the third section are all such as have made or shall hereafter make "any contract with any municipal corporation in this State." The corporations contemplated in the first section are prohibited therein "from making any transfer of freight, passengers or express matter to or with any other railroad company either by delivering or receiving the same, at any other place than in the State of Iowa," at the point where the connecting railroads terminate. The second section imposes a like prohibition upon the contemplated railroads therein, and requires them to erect and maintain, at the point of termination of their respective roads, within the limits of this State, all depots, stations and other buildings necessary for the transfer required by the statute, within the State. The third section prohibits the corporations referred to from violating any contract made with a municipal corporation of the State, and requires them to perform specifically the obligations imposed by such contract.

The statute, as plainly appears from its language and as disclosed by its history, as well as the public history of the controversy concerning the true point of the eastern terminus of the Union Pacific Railroad, is intended to compel the corporations whose railroads terminate at Council Bluffs to make all transfers with connecting lines inside that city.

It may be well first to inquire as to what are the acts prohibited and required by the statute—what is the meaning ^{1. RAILROADS: what constitutes a transfer.} of the language, "transfer of freight, passengers or express matter," used in the statute to express the acts required to be done within the city of Council Bluffs? There is little difficulty in answering this question, for the language to be interpreted is of frequent use and well understood when applied to the carrying business of the country. It expresses the act of

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removing freight, passengers and express matter, and, in the connection in which it occurs in the statute, implies the removal of these subjects of transportation from the custody of one common carrier to that of another—from one railroad to another—for the purpose of completing their transportation to the place of destination. This may be, and is usually, done by railroad companies in the prosecution of their business in two different ways. In the one case, passengers and freight are removed from the cars of one company to those of another at the point of connection, and in the other, the cars themselves, with their burdens of passengers and freight, are transferred to and upon the connecting road and the subjects of transportation are thus carried to or toward their places of destination. In the case before us the course last indicated was pursued by the defendant, which constitutes the ground of complaint on the part of the plaintiff. It must be understood that our conclusions as to the law of the case are based upon the state of facts as established by the pleadings and evidence, namely: that the cars of the defendant with their burdens have been and are being transferred at Council Bluffs, the terminus of its road, to another railroad and upon it drawn to Omaha, where they are discharged of their contents, and after being loaded with eastern-bound passengers and freight are returned to the defendant's road. Transfers of passengers and freight from and to the cars of the defendant, from and to other railroads in the manner of transfer first above indicated are made at Omaha instead of at Council Bluffs. We have then the case of two *transfers*, one of cars and their burdens from defendant's railroad to the Union Pacific Railroad at Council Bluffs, the other of passengers and freight, by change of cars, at Omaha. The plaintiff insists that the prosecution of the defendant's business in this manner is in violation of the statute of the State above referred to. That the statute was intended to prohibit such transfers there is no room for doubt.

It becomes our duty now to determine whether this statute is in conflict with the Constitution of the United States. In order to do this, we must first inquire into and deter-

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mine, as a matter of fact, the effect of the enforcement of
2. ____: con- the statute upon the business of defendant in
stitutional law: regula- the transportation of passengers and freight. It
tion of com- would necessitate the breaking of bulk of all
merce. freights and the change of all cars for passengers, trans-
ported by the defendant, at Council Bluffs, in cases where
bulk is broken or change of cars is made between the place
of receipt by the carrier and the place of destination, where
that was beyond the western terminus of defendant's road.
It would prohibit the running of a car-load of merchandise
carried over defendant's road across to Omaha, although con-
signed there. The car would have to be unloaded, the goods
removed from the car in Council Bluffs, and there re-loaded
on a car upon the Union Pacific Railroad in order to be car-
ried over to Omaha. So, also, freight transported from Omaha
eastward over defendant's road could not be *there* received
into the cars of defendant, but would have to be carried across
the river to Council Bluffs and there transferred into defen-
dant's cars.

As we understand the record, the fact is disclosed that in
the changes of cars made at Omaha, of which plaintiff com-
plains in the petition, the destination of the passengers and
freight was either west of that city or east of Council Bluffs,
depending upon the direction in which the train was moving.
If the statute should be enforced an additional change or
transfer of cars would be required at Council Bluffs. This
would cause delay and impose expense, thus interposing an
obstacle to the free and speedy transportation of commerce
among the States seeking that channel of communication.

It follows from these considerations that the statute in
question is an attempt to impose regulations and restrictions
which operate to embarrass and hinder the free and speedy
transportation of commerce between the States.

The Constitution of the United States, Art. I, Sec. 8, con-
fers upon Congress the power "to regulate commerce with
foreign nations, and among the several States, and with the
Indian tribes." The authority here granted extends to all
matters involving subjects which pertain to or affect commerce.

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Commerce is the interchange or mutual change of goods, productions, or property of any kind, between nations or individuals. Transportation is the means by which commerce is carried on; without transportation there could be no commerce between nations or among the States. Any regulation of the transportation of inter-state commerce, whether it be upon the high seas, the lakes, the rivers, or upon railroads or other artificial channels of communication, affecting commerce, operates as a regulation of commerce itself. It has been so held by the Supreme Court of the United States. *Reading Railroad Co. v. Pennsylvania* (State Freight Tax Cases), 15 Wallace, 232; *Passenger Cases*, 7 How., 283; *The State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How., 421; *Gibbons v. Ogden*, 9 Wheat., 1; *Brown v. The State of Maryland*, 12 Wheat., 419; *Almy v. The State of California*, 24 How., 169.

Taxation upon freights carried by railroad companies, laws requiring the payment, by the master of vessels, of a fixed sum for each passenger brought from a foreign port, those granting the exclusive right to navigate rivers with boats propelled by steam, those imposing a stamp duty upon bills of lading, and those authorizing the building of bridges over navigable rivers, and the like, are held to be regulations of commerce.

A State statute imposing a tax upon all persons leaving the State by railroads or stage coaches, and requiring the corporations or individuals engaged in their transportation to make report of the number of such persons carried by them, and pay the tax imposed, was held to be in conflict with the Constitution of the United States, on the ground that it imposed an obstacle to the free and unobstructed communication and travel of the citizens of the United States in the discharge of their duties as such, and in the prosecution of their lawful business in other States, and in foreign countries. *Crandall v. The State of Nevada*, 6 Wallace, 35.

It will be observed that the State statutes, which, in the cases above cited, were held to be unconstitutional, imposed burdens upon the transportation of inter-state commerce by

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the levying of taxes. The same principles upon which these statutes were held invalid apply to statutes creating burdens or imposing restrictions of a different character. Commerce may suffer no more from a law requiring a direct tax to be paid thereon into the State treasury, than from a regulation under which charges will be exacted by individuals, as would be the case of transferring freight from the cars of one railroad to those of another at State lines when the connecting roads form continuous lines over which freight may be carried without change of cars. And a regulation of the State whereby the most speedy transit is prevented may be a greater burden upon inter-state commerce—a greater embarrassment to it, than taxes of the character held invalid in the cases above cited. Celerity in the transportation of passengers and freight is now imperatively demanded by the business of the country; every impediment thereto is a burden upon commerce. State statutes producing such results are, under the authorities cited, clearly in conflict with the Constitution of the United States. Subjects of legislation of this character, which are in their character national, affecting the whole country, or different sections of the country, and confided by the Constitution to the general government, are exclusively within the legislative control of Congress. *Reading Railroad Company v. Pennsylvania*, 15 Wallace, 232; *Cooley v. Port Wardens*, 12 How., 299; *Gilman v. Philadelphia*, 3 Wallace, 713; *Crandall v. The State of Nevada*, 6 Wallace, 35.

The State statute under consideration affects the commerce of the whole country. The Union Pacific Railroad, with which the defendant's railroad and others centering at Council Bluffs connect, is a great thoroughfare over which the commerce and trade of the Pacific States, and to some extent that of Asia, is carried. The defendant's road, and other roads referred to, bear to and from the Union Pacific Railroad the commerce and trade which are national in their character, and in fact, to some extent, also pertain to foreign nations. If any regulations respecting the transfer of freight and passengers in their transit from one State to another upon railroads, or in respect to railroads engaged in the transportation of the sub-

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jects of inter-state commerce be necessary, the power to make such regulations is by the Constitution conferred upon Congress. It may do so by enactments establishing a uniform system, which will have regard to the general interest of the commerce of the whole country. State enactments are usually designed to meet local wants and demands; Congressional enactments are such as are required by the whole country. The people of the several States, so far at least as the interests of foreign and inter-state commerce are concerned, must be regarded as one nation, and regulations affecting these interests should be uniform throughout all the States. Inter-state commerce and the transportation necessary to its existence are not local in their nature, but affect the people of all the States. The Constitution of the United States has, therefore, wisely committed to the national legislature the duty of establishing regulations of the character of those prescribed by the statute under consideration.

In our opinion, Congress has enacted regulations upon this very subject which are in conflict with this State statute; this being so, the statute cannot be sustained.

It has been held by the Supreme Court of the United States that upon certain subjects pertaining to commerce, the States, ~~a — : —~~: in the absence of Congressional enactments, may ~~—~~ adopt regulations; but when Congress has assumed to act upon such subjects, the State enactments conflicting therewith cannot be enforced. *Crandall v. The State of Nevada*, 6 Wall., 35; *Gilman v. Philadelphia*, 3 Wall., 713; *Cooley v. The Board of Wardens*, 12 How., 299.

By an Act of Congress approved July 1st, 1862, 12 U. S. Statutes at Large, 496, U. S. Revised Statutes, p. 1022, § 5257, other railroad companies are authorized to connect their roads with the Union Pacific Railroad or any of its branches. The Act of June 15, 1866, 14 U. S. Stat. at Large, 66, U. S. Revised Stat., p. 1022, § 5258, provides that "every railroad company in the United States * * * * is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any state to another state, and to

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receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination." Under these statutes the defendant is authorized to connect its railroad with the Union Pacific Railroad so as to form a continuous line for the transportation of passengers and freight to the places of their destination. The *connection* indicated by the language of these acts of Congress is that whereby the cars of one road may be transported over the other, so that passengers and freight may be carried as upon a continuous line of railway without change of cars. The provision last quoted expresses this thought by direct and plain language, and the first implies the same, for it is hardly probable that Congress meant no more by the word "*connect*" used in the provision than that freight and passengers may be transferred from the cars of one railroad to those of another. On the contrary, it was intended that the cars themselves, with their burdens, should be transferred from one road to another, so that passengers and freights might be transported from ocean to ocean without change of cars or breaking bulk, as upon one continuous line of road. The purpose of the statutes is evidently in the interest of commerce, intended to promote speedy and unobstructed transportation, and to relieve the products and merchandise of the country of the indirect tax of breaking bulk and re-shipping at the various railroad termini when being transported by rail. Nothing tends more effectually to produce these results than continuous lines for the carriage of commerce. The delay, expense and loss attending the breaking of bulk and reshipment is a serious embarrassment and impediment to commerce. These Congressional enactments, under the interpretation given them, tend to remedy these evils; any other interpretation would destroy their force and defeat their evident purpose.

Under these laws the defendant is authorized to make connection at Council Bluffs, whereby its cars may be transported with their burdens upon the Union Pacific Railroad, or any other railroad, so as to form a continuous line, and to receive and transport over defendant's road the cars of other connect-

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ing roads. This is just what the plaintiff complains of and alleges to be in conflict with the statute of the State. But as that statute is in conflict with the Constitution and laws of the United States, it cannot be supported as a valid law, and confers no right entitling the plaintiff to the relief it has demanded.

It is insisted by appellee that the State statute simply provides the place of transfer, when transfers are made by the defendant; that, as shown by the evidence in the case, transfers are made upon the Union Pacific Railroad at Omaha, where freight and passengers are removed from and to defendant's cars, to and from those of other railroad companies. It is insisted that this transfer should be made at the terminus of defendant's road, and that the State may rightfully compel it. We have seen that defendant has the right to connect with the Union Pacific Railroad, to transfer to and receive from it cars with their burdens. When the cars of the defendant are lawfully received by the Union Pacific Railroad Company, there is no authority possessed by the State to prescribe that after such cars have been transported out of the State upon that road the freight and passengers contained therein shall not be transferred to other cars at any point before reaching their destination. Neither does the State possess authority to prohibit the defendant from receiving cars from the Union Pacific Railroad, wherever their burdens may have been put into them.

If Iowa may, by law, require that bulk of cargoes transported upon the railroads of the State shall be broken; that passengers and freight shall be transferred from and to the cars of such roads at their termini, to and from the cars of other connecting roads, and that cars with their contents shall not be hauled or transported over the said roads in Iowa, which are transported from the roads of other States, laws of the same character may be made by each of the States of the Union. If such powers were possessed by the States, and exercised by them, we would in vain hope for continuous lines of transportation, a thing of the highest importance to all the people of the Union, and of the utmost importance to the

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people of Iowa, whose agricultural productions, the great source of our wealth, find a market through channels of transportation wholly within the borders of sister States. The commodities of trade which are brought here from other States are carried upon the same railroads and rivers that bear our productions to market. The principle upon which the statute in question is attempted to be sustained would afford support for legislation by other States which would embarrass the commerce of this State by imposing upon it unlimited burdens. These thoughts commend the wisdom of the constitutional restriction upon the exercise of such powers by the individual States of the Union.

We fully recognize the well settled doctrine that the State, by virtue of its police power, may enact all such laws as 4. —: —: may be necessary or proper to protect its citizens authority of state. in their persons, health and property, to guard them against frauds, impositions and oppressions, even where such laws may in some respects affect persons or corporations engaged in the transportation of foreign or inter-state commerce, such as quarantine and health laws, all laws to prevent the commission of felonies, misdemeanors, or other breaches of the peace, etc. *The Mayor etc. of New York v. Miln*, 11 Pet., 102; *Gibbons v. Ogdon*, 9 Wheat., 1; *License Cases*, 5 How., 504; *Brown v. Maryland*, 12 Wheat., 419; *Passenger Cases*, 7 How., 283; *Fuller v. The C. & N. W. Ry. Co.*, 31 Iowa, 187. The views we have expressed in respect to the validity of the statute under consideration are in no respect inconsistent with the doctrine above referred to. The act is not in the nature of a police regulation, nor confined within the exercise of the police power of the State.

We do not hold that the General Assembly would not have the power to pass laws regulating the time or manner of making transfers of the subjects of commerce transported by railroad carriage from and to points wholly within the State. But this is not the character of the act under consideration. As we have already seen, it would, if given effect, operate directly upon inter-state commerce, creating burdens upon it

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of a character which have frequently been held to be beyond the power of the States to impose.

The act also, by its terms, claims to regulate commerce both within and without the State by *requiring* transfers to be made in Iowa and prohibiting the same being done in Nebraska.

Whether or not we would be required to hold the act to be invalid also under section 30, article 3 of the Constitution of Iowa, which prohibits the passage of special laws where a general law can be made applicable, we do not determine, since counsel have not argued that question.

II. We will now consider the effect of the ordinance of the city granting the right to defendant to construct its road upon

5. — : occupation of street: contract. the streets of the city. It declares that it shall be lawful for defendants to occupy the streets named with its railroad upon the condition, among others, that defendants shall transfer freight and passengers, carried by it, within the city limits. It is claimed that the occupancy of the streets for the purposes of the railroad, operates as an acceptance of the conditions, and raises a contract whereby defendant is bound to their performance.

Without inquiring whether a contract may exist, under municipal legislation, of this character, binding the grantee of the rights conferred to the performance of the conditions imposed, we are of the opinion that, in this case, no such obligation is created, for the following reasons: The defendants, under the law of the State as it then stood, had the right to occupy the street upon which its railroad is constructed, without the consent of the city. *The City of Clinton v. The C. R. & M. R. R. Co.*, 24 Iowa, 455; *Chicago, Newton & Southwestern R. Co. v. The Mayor of Newton*, 36 Iowa, 299.

It is very plain that if the city, by direct legislation, could not have prevented the occupancy of its streets by defendant's railroad, it could not, by affixing a condition to its assent to such occupancy, defeat defendant's rights under the laws of the State. As the ordinance of the city conferred no right upon defendant that it did not before possess under the statutes of the State, there is no consideration upon which to base

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a contract, even if it be admitted (but which we do not decide) that the ordinance and occupancy of the streets by defendants would, under other circumstances, raise a contract binding the defendant to the performance of the conditions imposed upon it.

It is urged by appellee that the right of way act (Revision, Art. 3 of Chap. 55, p. 218), upon which the decisions above cited are based, will not repeal the provisions of the charter of the city of Council Bluffs, a prior enactment, which confers the control of its streets and alleys upon the city council. But counsel are mistaken in assuming that the city charter took effect prior to the right of way act. That act became a law February 9, 1853. The city charter was approved January 24, 1853, and the last section provided that the act should take effect from and after its publication in certain newspapers named therein. It was never so published, and it took effect under the general provisions of chapter 3, Code of 1851. Under these provisions the city charter went into operation after the right of way act took effect.

Finding the State statute, under consideration, to be in plain conflict with the Constitution of the United States and with acts of Congress passed in pursuance thereof, it becomes our duty to declare the statute of the State invalid and without force as a law. *Stewart v. The Board of Supervisors of Polk Co.*, 30 Iowa, 9, and cases cited.

The order of the Circuit Court allowing the injunction must be

REVERSED.

BECK, J., *dissenting*.—I am unable to concur in the conclusions announced in the foregoing opinion, and will proceed, with brevity, to state the grounds of my dissent:

I. The defendant transfers its passengers and express matter at Omaha, to the cars used upon the Union Pacific railroad. Its cars are hauled from its terminus at Council Bluffs, which is upon the east side of the Missouri river, on the Union Pacific railroad, by the engines of the transfer company, or of the Union Pacific Railroad Company, to Omaha,

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on the west bank of the river. The east and south trains are made up of cars to which passengers and express matter have been transferred at Omaha, from the cars of the Union Pacific Railroad Company. Transfers are made at that place to and from the cars of defendant, and its officers have charge of such cars and control their transportation between Omaha and Council Bluffs.

It is not pretended that the roads of defendant and the U. P. R. Co. are, by any contract or arrangement, so united as to form a *continuous* line of railroad for the transportation of passengers and property without change of cars. *There is, in fact, a transfer of passengers and express matter from the cars of one road to the cars of the other as the business of the two corporations is and ever has been managed.* This transfer is at Omaha. The western terminus of defendant's road and the eastern terminus of the Union Pacific railroad are at Council Bluffs, upon the border of this State. The transfer of passengers and property transported by these roads, from one to the other, is made just beyond and without the jurisdiction of Iowa and within the State of Nebraska.

The statute of this State, brought in question in this case, does not require and render obligatory the transfer of freight and passengers, or prohibit the operation of the two roads as a continuous line for transportation without change of cars. It simply prescribes the place of transfer, when transfers of the subject of transportation are actually made from the cars of one road to those of the other. The same is true of the ordinance of the city of Council Bluffs involved in this case. A careful reading of the statute and ordinance cannot fail to carry conviction to the mind of the correctness of this conclusion.

II. Having reached the foregoing conclusions as to the facts disclosed by the record, and the true effect and object of the statute and ordinance brought in question, I proceed to inquire whether they are in conflict with the Constitution of the United States. Art. I, Sec. 8 of that instrument, confers upon Congress power to regulate commerce between the States. I do not doubt that transportation is a constituent of commerce and, therefore, the regulation of transportation

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is the regulation of commerce itself. The cases cited in the foregoing opinion, and other decisions of the United States Supreme Court, establish this doctrine. But does the statute of the State under consideration assume to so "regulate commerce" as to usurp authority exclusively vested by the constitution in Congress?

It is, I believe, now the settled doctrine that the States may exercise legislative power, as conferred by their respective constitutions, in all cases but those falling within the following exceptions:

"1. When the power is lodged exclusively within the Federal Constitution.

"2. Where it is given to the United States and prohibited to the States.

"3. Where, from the nature and the subjects of the power, it must necessarily be exercised by the National Government exclusively." *Gilman v. Philadelphia*, 3 Wal., 713.

It clearly appears from the context of this quotation, that the court must be understood, by the language of the first and second paragraphs, to declare that the power must be exclusively conferred upon the United States, or prohibited to the States by express terms. Justice STORY, in *Houston v. Moore*, 5 Wheaton, 1 (49), announces the doctrine that powers, granted by the Constitution to the Federal Government, "are never exclusive of similar powers existing in the States, unless where the Constitution has *expressly, in terms*, given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompetency in the exercise of it by the States." It cannot be claimed that the Constitution, in express terms, confers upon Congress the power to legislate upon the subject of the State statute under consideration.

In *Gilman v. Philadelphia, supra*, a case involving the construction of the section of the constitution conferring power upon Congress to regulate commerce, it is declared that "whether the power, in any given case, is vested exclusively in the general government, depends upon the nature of the subject to be regulated." In another case, *The Reading*

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Railroad Co. v. Pennsylvania, 15 Wall., 282, the following rule is laid down, which, applied to the subject to be regulated, enables us to determine whether the power to regulate is exclusively within the United States. It is this: "Whenever the subjects, over which a power to regulate commerce is asserted, are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress."

We must inquire what is the subject of the regulation prescribed by the statute of Iowa which is now before us? I have answered the question in the foregoing statement of the effect and object of the law. It is the place of making transfers of property carried by railroads, from the cars of one road to those of another. It must be admitted that this pertains to and affects transportation which, as I have said, is a constituent of commerce. But it is not, in fact, a regulation of transportation—commerce, which is within the class of subjects that are national in their character, or admit of one uniform system. It belongs to that class of subjects which pertain to the duty of corporations exercising the functions of common carriers, and to the authority of the State to prescribe rules governing the manner of the exercise of power and rights conferred by the State upon such corporations. It is clearly within the police power of the State. Of this class of subjects may be reckoned regulations fixing the rate of speed of cars, prescribing a tariff of charges, forbidding the running of trains on Sunday, and providing protection for persons and property transported upon railroads.

Any city of the State may prescribe by ordinance the place at which passengers and freight shall be received and discharged by railroads operating within its limits. It may also fix a place for the transfer of passengers and freight voluntarily made by one railroad to another, each having its terminus within the city. Surely the State may do the same thing; when transfers are made, it may prescribe the place thereof. And this alone is the object and effect of chapter 6, Acts, 1872, the statute in question in this case.

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Our Code is not wanting in provisions affecting railroads similar in character and founded upon the very authority under which this statute is enacted. Section 1292 of the Code is in this language: "Any railway corporation operating a railway in this State, shall, on request, permit the railway operated by any other company to connect therewith, and shall draw over its railway the cars of such connecting railway, at reasonable terms, and for a compensation not exceeding its ordinary rates." Here is a statute regulating transportation, a constituent of commerce, whereby a railroad company, unwilling to operate its road in connection with another as a continuous line, may be compelled to do so at the will of the corporation owning the connecting road. The provision prescribes the duty of the corporation required to connect its road with another, and the manner of discharging its functions as a common carrier, and directs the exercise of its corporate powers conferred by the State. An unwilling railroad company is compelled to draw the cars of another corporation for the public good. The statute pronounced unconstitutional by the majority of this court, requires unwilling railroad companies to transfer the subjects of transportation at such places as the legislature has determined the public good requires, or is demanded by sound public policy. I am unable to distinguish between the principles of the respective enactments, or to discover a source of legislative power that is not common to both. Surely my brothers are not prepared to hold the statute just quoted, and all other enactments based upon the same constitutional principles, which are numerous, void because they are in conflict with the Federal Constitution.

III. The objection urged against the statute on the ground that it is intended to and does operate without the limits of the State, and is, therefore, an attempt of the State to exercise authority beyond its jurisdiction, is, in my opinion, not founded upon facts. The statute requires defendant, a corporation created under the laws of the State and operating a railroad within its borders, to make its transfers, where transfers are made, in the State. The corporation and road are

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subject to the authority of the State, and the act required is to be done within the State. Surely, then, the statute cannot be said to operate out of the State. Its consequences, it is true, may extend beyond the State limits, and the same thing is true, in a greater or less degree of almost all statutes. All laws of the State affecting railroads having connections or parts of their lines out of the State, in their consequences reach beyond our borders and affect the connections or portions of the road found there.

It is urged that, if transfers which are now made at Omaha must, under the statute, be made at Council Bluffs, this operates to forbid transfers at the city first named, and, therefore, has effect out of the State. But, if it prevents transfers at Omaha, this is accomplished through the consequences of the enforcement of the statute, and not in obedience to the laws of the State. The enforcement of the statute within the jurisdiction of the State creates a necessity which operates upon and controls subjects and persons without the borders of the State. Our laws and police regulations affecting trade thus extend, in their consequences, to every State and country with which our people hold commercial relations. I forbear to illustrate the argument by showing any of the numerous instances where the laws of the State, in their consequences, affect persons and property in other States. Due reflection will bring to mind such instance analogous to the case under consideration, and will evolve and apply arguments in support of the position I maintain.

IV. Upon the subject of the statute—the transfer of passengers and freight by railroads to connecting lines of transportation, Congress has assumed no control. The act of June 15, 1866, referred to in the opinion of the majority, provides for the connection of railroads, “so as to form continuous lines for the transportation (of freight and passengers) to the place of destination.” The law is within the scope of the constitutional power of Congress, being a regulation of inter-state commerce. But it makes no provision as to the place or manner of the connection of railroads; neither does it make such connections obligatory. It authorizes connections, which no

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State may forbid, but it extends no farther. The acts of July 2, 1864, authorizing the construction of the Omaha bridge, and of February 24, 1871, empowering the Union Pacific Railroad Company to issue bonds for that purpose, with other statutes pertaining to the subject, all of which were cited by counsel for defendant, and are, I believe, referred to in the foregoing opinion, contain nothing upon the subject under consideration different in effect from the act first referred to above. They do not enforce or require the connection of railroads so as to form continuous lines, nor forbid transfers of the subjects of transportation from the cars of one railroad to those of another. No regulations are prescribed governing the place and manner of such transfers. As this is a subject of legislation not within the Federal jurisdiction it was not intended to be touched in any of the various enactments just enumerated, each of which presented the occasion for and an invitation to the exercise of the power over it, were that power possessed by the General Government.

V. In my opinion the conclusion of fact, announced by my brothers in the foregoing opinion is incorrect, namely, that, if the statute in question be enforced, two transfers instead of one would, or might be required, one at Omaha and the other at Council Bluffs, resulting in delays and expenses to transportation beyond what is imposed by the transfer at Council Bluffs alone, which is required by the statute to be made by defendant. It is insisted that an obstacle to free commercial communication would be thus created. I am free to declare that I could look in no friendly spirit upon any statute, either state or national, the design or effect of which should be to fetter commerce and impose unjust and unnecessary restrictions and prohibitions upon the free, cheap and expeditious transportation of persons and property. I would eagerly seek, and earnestly hope to find, some constitutional ground upon which such legislation could be declared void. But whether it can be found, I am not now called upon to determine, for I have a clear and most positive conviction that no such objection, in fact, exists to the statute now under consideration. A brief statement of the facts of the case dis-

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closed by the record will, in my opinion, render plain the correctness of my position.

The eastern terminus of the Union Pacific Railroad is in Council Bluffs, and the cars of defendant are drawn over the track of that road, which extends across the bridge, from the depot of defendant in Council Bluffs to Omaha. No other railroad extends from Omaha to Council Bluffs. The Union Pacific Railroad Company has a depot, station and grounds for the transaction of business at Council Bluffs, which are called Transfer Grounds. The distance from the ground to the Union Pacific depot at Omaha is not shown by the record, but we are warranted in inferring therefrom, that it is not to exceed two or three miles. The subjects of transportation involved in this action are such as are carried in defendant's cars to and from Omaha, and there transferred to the cars of the Union Pacific Railroad Company. Now, from this statement of facts, it is obvious that freight and passengers destined for Omaha are not within the contemplation of the statute, for when they reach that city in defendant's cars they are not transferred. Arriving at the place of destination they require transportation no farther and therefore it is impossible to imagine that they are put upon the cars of any other railroad. As to freight and passengers destined to Omaha, the defendant's road and that of the Union Pacific Railroad Company form a continuous line. The statute, as I have shown, cannot apply thereto. Indeed, I understand, from the record, that plaintiff complains only of the action of defendant in regard to the subjects of transportation carried beyond Omaha; certain it is, of nothing else can it complain. Passengers and freight, then, destined for Omaha are not transferred at Omaha, and the statute does not require that they should be transferred at Council Bluffs. As to these it is plain that the statute is not obnoxious to the objections under consideration.

VI. In regard to the passengers and freight which must be transported upon the Union Pacific Railroad in order to be carried to their destination the case is equally plain. If, as required by the statute, they be transferred to the cars of that road at Council Bluffs, there can be no other transfer. If the

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Union Pacific Railroad Company cause them to be taken out of its own cars and put into others owned by it or operated upon its road, at Omaha or any other point upon its road, this would not be a transfer according to the meaning of the word as used in the statute and understood by all men when applied to the business of railroads. There can exist no necessity for such a course of business, and there can be no presumption that it ever was or ever will be pursued. But if pursued, whether wantonly or for some sufficient reason, it would not be brought about because of the transfer required by the statute at Council Bluffs.

It is not claimed that the legislature of Nebraska or Congress has enacted any law requiring the Union Pacific Railroad Company to change its cars at Omaha. Such legislation, I presume, would hardly be attempted by the State named, as the corporation, which would be affected thereby, derives its existence from Congressional legislation, and Congress, it cannot be supposed, would thus place restrictions and impediments upon inter-state commerce. As such legislation can only exist in imagination, it is vain to inquire into its validity. This subject is only noticed here for the reason that future legislation of this character, whereby a transfer would be required by law to be made in Omaha, is urged as the ground for claiming that the enforcement of our statute would occasion the delay and expense incident to two transfers instead of one.

It is an appropriate connection here in which to remark that, in my opinion, the State statute does not forbid the Union Pacific Railroad Company to receive the cars of defendant at Council Bluffs to be drawn to the places of destination of the property with which they are laden. In that case there would be no transfer of freights or change of cars. The transfer of cars, as explained in the opinion of the Chief Justice, would occur at Council Bluffs, and if the law applies to that act—if the term *transfer* used therein relates to the act of changing cars from one road to another, it would be done at Council Bluffs; in fact, it could not be done at Omaha for defendant's road does not extend to that city. The law in such cases, if applicable thereto, would not be violated.

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VII. I will next consider the case of freight and passengers having points of destination beyond Omaha, or transportation from such points upon railroads, other than the Union Pacific, to and from Omaha, which are carried through Council Bluffs. These roads, it will be remembered, do not reach Council Bluffs, and therefore do not connect with defendant's road.

It will be readily understood that, if the subjects of transportation are carried upon these other roads, the Union Pacific and defendant's road, without change of cars, such a course of business would not be within the contemplation of the statute in question, for the roads would be operated as continuous lines, and there would occur no transfers provided for by the statute.

It will be readily seen that in cases where the railroads referred to are not operated as continuous lines, and there is in fact a transfer of freight and passengers from and to the cars of defendant before their destination is reached, the requirement that such transfer be made at Council Bluffs does not create a necessity, nor require, for convenience of business, another transfer to be made at Omaha. If freights and passengers destined for points east of Council Bluffs are carried to Omaha by the Nebraska railroads and there transferred to the Union Pacific railroad, I discover no escape from the conclusion that they must be regarded, when they reach Council Bluffs, as all other subjects of transportation carried by that railroad. Freight carried by defendant cannot be transferred to the Nebraska roads (other than the Union Pacific), because there is no connection between them. Freights and passengers transferred in either direction, for this reason, must, of necessity, pass into the hands of the Union Pacific Railroad Company, being transferred to and from it. Now the fact that the subjects of transportation are transferred from or to the cars of a connecting railroad by the Union Pacific, cannot be the grounds of an objection to the transfer at Council Bluffs instead of Omaha, when such transfers are actually made to and from the cars of roads terminating at Council Bluffs. It will cause no greater expense and delay

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for the Union Pacific company to draw the cars of the connecting Nebraska road to Council Bluffs, its terminus, for the purpose of making transfer there, than to take defendant's cars to Omaha for that object. The law, then, imposes no necessary expense or delay. It is true that the Union Pacific company may, if the transfer is made at Council Bluffs, require another to be made with its connecting lines at Omaha. But as neither the course of business generally pursued by railroad corporations and other carriers, nor the interests understood to prompt the action of the Union Pacific Railroad Company in the transfer controversy, which will be presently referred to, can require transfers, in any case, to be made both at Council Bluffs and Omaha, but on the contrary forbid it, I cannot presume that it will ever be done. As before remarked in reference to future legislation, it would be vain to consider the power and right of the Union Pacific Railroad Company to pursue such a course, or its effects upon commerce, where its future occurrence is so highly improbable.

VIII. It is a matter of notoriety, the world over, that this transfer controversy has its origin in interests growing out of and connected with the bridge over the Missouri river, upon the line of the Union Pacific Railroad. A great part of the commerce between the Pacific States and the rest of the Union must be carried over this bridge. It is brought to Council Bluffs or carried thence by several important railroads, among them the line owned by the defendant. Westward of the Missouri river it is carried by the Union Pacific Railroad. The bridge was built by the Union Pacific Railroad Company under authority conferred by Acts of Congress of July 2, 1864, and February 24, 1871. 13 U. S. Statutes at Large, 360; 16 Id., 430. By the last named statute the Union Pacific Railroad Company was "empowered, governed and limited by the provisions" of the Act of July 25, 1866, authorizing the building of a railroad bridge at Quincy, in the State of Illinois. 14 U. S. Statutes at Large, 244. The act last mentioned authorizes all trains of all railroads terminating at the place where the bridge is erected, Council Bluffs, to cross it "for reasonable compensation to be made

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to the owners of the bridge." If the trains upon the Iowa roads terminating at Council Bluffs are required to make connections at Omaha, and transfers are made there, tolls are levied thereon by the Union Pacific Railroad Company on account of the use of the bridge. If the point of connection and transfer be at Council Bluffs, the Union Pacific Railroad Company's trains cross its own bridge and it thereby loses the toll which, if other roads crossed the bridge, it would levy upon its connecting roads. The reason why the Union Pacific Railroad Company refuses to operate its road to its eastern terminus at Council Bluffs and requires transfers to be made at Omaha is thus made plain. But the grounds upon which defendant submits to this unjust requirement do not appear.

The question of the place of transfer is one of expense and exaction upon the commerce of the country. But this exaction occurs not through transfers made at Council Bluffs; it is levied by means of the transfers at Omaha. And yet I am surprised by the argument, sanctioned by the foregoing opinion of my brothers, that the transfer at Council Bluffs, required by the legislation of this State, imposes expense and burdens upon commerce.

The fact that Omaha is sought to be made practically the eastern terminus of the Union Pacific Railroad, by the enforcement of transfers there, for the purpose of levying exactions and tolls upon the commerce transported over the bridge, is disclosed in the legislative history of this State pronounced unconstitutional by the majority of this court. From that source I am authorized to derive judicial knowledge of the fact. The object of the law, as I understand it, is to prevent the evil thus threatened, by the unjust and unwarranted levy of tolls upon inter-state commerce.

It is my opinion that the judgment of the Circuit Court ought to be affirmed.

ON REHEARING.

ADAMS, J.—Upon a rehearing of this case we have to say that we are of the opinion that the decision of this court was correct.

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The main question discussed by counsel is as to whether the act of the legislature of February 29, 1872, conflicts with Article I, Section 8, of the Constitution of the United States, and with the Acts of Congress passed in pursuance of the same. The Constitution confers upon Congress the power to regulate commerce among the several States. The Act of Congress of June 15, 1866, provides that every railroad is authorized to connect with roads of other States so as to form continuous lines. The first section of the act of the legislature in question provides in substance that the defendant shall not transfer freight or passengers to, or receive them from, any other railroad near its terminus at Council Bluffs except within the State of Iowa. The object of this section seems to be to prevent transfers at Omaha between the defendant and the Union Pacific Railroad Company.

The second section goes somewhat farther. It provides, in substance, that the Union Pacific Railroad Company shall make no transfers of freight or passengers to, or receive them from the defendant *at any place*, except near its terminus, in Iowa.

The city of Council Bluffs passed an ordinance providing, in substance, that no transfers should be made between the defendant and the Union Pacific Railroad Company, except within the corporate limits of the city of Council Bluffs. The act of the legislature in question prohibits the defendant from violating said ordinance.

We have, then, two questions: 1. Was it competent for the legislature to prohibit all transfers between the two companies except at Council Bluffs? 2. Was it competent for the legislature to prohibit all transfers between the companies at Omaha? In answering these questions we think that only one principle is involved, and, therefore, we may treat them as substantially the same.

Under the said act of Congress it was competent for the defendant to make whatever arrangement it should see fit with the Union Pacific Railroad Company for running its cars over the Union Pacific road. It was authorized to connect so as to form a continuous line. This cannot mean simply that it was

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authorized to transfer freight and passengers to the Union Pacific road, for that would not make a *continuous line* in any proper sense of those words. It must mean that the defendant was authorized to transfer its cars with their freight and passengers to the Union Pacific road. Now this is precisely what the defendant has done; and of this the plaintiff cannot complain for two reasons. It was not only authorized by the said act of Congress, but such transfers have in fact been made at Council Bluffs, the very place where the act of the legislature provides that they should be made.

But, it seems that while the cars with their burdens have been transferred to the Union Pacific road at Council Bluffs, a further transfer, to-wit: a transfer of the burdens to the Union Pacific cars has been made at Omaha. This last transfer seems to be the real ground of the plaintiff's complaint. It must be so, because the first transfer was made where the plaintiff claims that all transfers should be made. Now, in regard to the transfer at Omaha, it is evident that there is a sense in which it might be said to be no transfer at all. This would certainly be so if the transfer of the defendant's cars with their burdens to the Union Pacific road was a transfer of them to the Union Pacific Company. There could not be a transfer to the Union Pacific Company of what it already had.

But, we will suppose that a transfer of the defendant's cars with their burdens to the Union Pacific road was not a transfer of them to the Union Pacific Company; and, indeed, we can conceive of an arrangement whereby the defendant might run its trains over the Union Pacific road, or a portion of it, without any transfer to that company.

The question, then, is as to whether the defendant can be prohibited from transferring to that company, except at Council Bluffs. It is evident that the defendant's cars may be used to carry freight or passengers to Omaha, or to any other point on the Union Pacific road, provided the freight or passengers are destined to those points. In such case there would be no transfer to the Union Pacific Company. Now, the plaintiff claims that if the defendant's cars can be used to carry freight

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or passengers to their destination on the line of the Union Pacific road, it is all that defendant can properly ask; and that if defendant desires to transfer to the Union Pacific Company, it may properly be required to do so at Council Bluffs.

The restriction imposed by the act of the legislature would not, we presume, ordinarily operate as a burden upon interstate commerce, but if it may do so it cannot be upheld. What, then, may be its practical operation? Suppose that defendant's cars are destined to Cheyenne, loaded partly with freight destined to Cheyenne, and partly with freight destined to San Francisco. But for the act in question, the cars could go through to Cheyenne with all the freight, and the San Francisco freight could there be transferred. But, under the act, all the San Francisco freight must be culled out and transferred at Council Bluffs, and the defendant's cars be taken to Cheyenne, if at all, only partially loaded. The same cars must return empty or find freight not in the hands of the Union Pacific Company.

Again, it seems certain that the defendant must often have empty cars at Omaha, which have been used in transporting freight to that city from towns and cities along the defendant's road. If the defendant's cars at Omaha can receive freight at Omaha from the Union Pacific Company destined to towns and cities along the defendant's road, it saves the Union Pacific Company the expense of transporting it to Council Bluffs, in order to transfer it to the same cars there. Many suppositions can be made, showing the tendency of the act in question to impair the value of the privilege conferred by Congress upon the defendant of so connecting with the Union Pacific road as to make a continuous line.

We will make only one other supposition. The defendant might, by some arrangement, send its cars with freight to some point on the Union Pacific road by a route different from that by the way of Council Bluffs. The act in question is sweeping enough to prevent the Union Pacific Company from receiving the freight at such point. It is abundantly manifest that such restriction cannot be upheld.

Freight should be permitted to seek its own place of trans-

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fer. To this it may be said that railroad companies will not always allow it, but will sometimes sacrifice the interests of commerce to promote some local interest. We think, however, that any attempt by law to impose restrictions in behalf of some other local interest will not only not remedy the difficulty but may increase it in many ways. And, so far as inter-state commerce is concerned, as Congress has attempted to regulate and promote it by providing for the use of different railroads as continuous lines, no State legislation can be permitted to interfere by any action which may possibly discourage or impair such use.

It is urged by the plaintiff, however, that the conclusion at which this court has arrived is inconsistent with the act of Congress which provides that the Union Pacific R. R. Co. shall operate its road to the western boundary of Iowa as a continuous line. This would be so if the running of trains by the Union Pacific company to the western boundary of Iowa would prevent transfers between it and the defendant elsewhere; or if transfers between it and the defendant elsewhere would prevent the running of trains by the Union Pacific Company to the western boundary of Iowa. The object of the statute, doubtless, was to obviate the necessity of all transfers being made at some point west of the western boundary of Iowa. To our mind it is entirely consistent to require the Union Pacific Company to run its trains to the western boundary of Iowa, and at the same time allow such transfers between it and the defendant at other points as the interests of commerce may require.

Beck, J., dissenting.—I. No fact, argument or authority has been brought to my attention upon the rehearing of this case which has diminished the confidence I possessed at the time of the announcement of the decision of this court, in the views and conclusions presented in my dissenting opinion then filed. The reargument on the part of defendant, while of admitted ability, has developed nothing new in the case which, in my opinion, supports the decision of the majority of the court. I have, upon the rehearing, reviewed the whole

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ground of controversy, and though anxious to concur with my brothers find myself unable to do so. The fact that three of the Justices now on the bench, who have taken their seats here since the decision of the cause, concur with the three who announced that decision, has stimulated me to greater care in the re-investigation of the case, and begotten, I must confess, a strong desire on my part to unite with them in their views of the law. But this inducement, strong though it be, has not, as it should not, overcome the convictions of my mind, planted upon the most thorough and careful consideration of the questions of which I am capable.

The facts and law of the case, as I understand them, have hedged in the path I have followed; from it I could not depart.

II. I do not think it necessary to adduce now further arguments supporting the conclusions of my dissenting opinion heretofore filed. I shall confine myself to pointing out what I conceive to be errors and misconceptions of facts in the preceding opinion of Mr. Justice ADAMS. It is admitted in his opinion that the restrictions imposed by the statute of the State in question would not "ordinarily operate as a burden upon inter-state commerce." But, it is said, "if it *may* do so it cannot be upheld." The opinion then proceeds to present certain supposed cases wherein the restrictions would have such effects. These cases I will proceed to notice, and I confidently expect to show that they are purely imaginary and will never occur in the prosecution of the business of the railroads, if common sense and the best interests of the railroad corporations control their affairs.

The first is the case of defendant's cars, destined for Cheyenne, loaded with freight, partly consigned to that place and partly to San Francisco. It is not the custom of the managers of railroads to load cars with freight destined to several towns, but freight for the several stations is put in separate cars. No exception to the rule exists, except in case there is not enough freight, at the place where the car is loaded, consigned to a given station to fill it. Now, my brother's supposed case is unfortunately chosen, for it is hardly probable that there

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ever will such a thing occur—that less than a car load of freight in one train will ever be sent through to San Francisco. But suppose such a thing should happen, would it not be more reasonable and less expensive, if it should be put in a car with Cheyenne freight, to carry it through to San Francisco, discharging the Cheyenne freight, and if it be necessary, supplying its place with freight destined from that place to San Francisco? Surely, it would.

In the case supposed by my brother, there would be more transfers and handling, and consequently more expense, than by sending the San Francisco freight in a through car and completing its burden with way freight at Cheyenne. In the case supposed by Mr. Justice ADAMS, the car returns empty from Cheyenne if it cannot be loaded with freight not in the hands of the Union Pacific Company. Surely, it cannot be thought the cars could or would be loaded with freight brought by the Union Pacific Company from points west of Cheyenne, thus making a transfer there from its cars to those of defendant. The case supposed, it will be readily seen, involves delay and expense in transferring freight, thus breaking a continuous line of railroad demanded by the wants of commerce and required by the laws of Congress under which the Union Pacific Railroad Company was organized.

III. The case of empty cars of defendant at Omaha equally fails to answer the purpose for which it is introduced.

If these cars are laden with freight, not brought to Omaha by the Union Pacific Company, to be transported to points on defendant's road, it will not be a violation of the State law in question. If they are loaded with freight from the cars of the Union Pacific Company, brought from the west, all there is of it is, that the last named company permits its cars to be idle while defendant's are used between Omaha and Council Bluffs. But, how this can be regarded as a burden on commerce, I fail to understand.

It affects the earnings of the two companies; one or the other must carry the freight from Omaha to Council Bluffs. If defendant does not, it suffers loss. If the Union Pacific Company does not, it is the loser. But, how commerce is bur-

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dened in either case, or more in one than in the other, in my judgment, cannot be made to appear.

IV. The last case put by Mr. Justice ADAMS is not within the contemplation of the statute in question. If defendant's cars reach Kearney Junction by the Burlington & Missouri River Railroad, and their freights are there transferred to the Union Pacific Railroad, which is the case supposed, such transfer is not forbidden by the statute.

The first section provides for transfer at the terminus of the roads. The second section does not forbid the Union Pacific to transfer freight to roads in Nebraska, to the Burlington & Missouri Railroad, for instance. No construction forbidding such transfer can be placed on the act.

The statute therefore does not forbid the course of business contemplated in the third case supposed by Mr. Justice ADAMS. The cases to which the statute is at all applicable, in my judgment, are those in which burdens are imposed upon commerce by the course of business pursued by the railroad corporations.

Commerce requires unbroken, continuous lines of transportation. The statute of the State tends to secure such a line over the full length of the Union Pacific Railroad, and forbids it to be broken within two or three miles of the eastern terminus of that road, for the purpose of imposing a tax upon commerce by the levy of bridge tolls upon the cars of other corporations. The course of business advocated by my brother imposes burdens on commerce; the law of our State, which this court pronounces void, removes them.

V. It is a familiar doctrine of the courts that a statute will not be declared unconstitutional except in clear cases. Doubts are to be solved in favor of the validity of a statute, and its incompatibility with the constitution must be obvious and admit of no doubt.

The statute when capable of different interpretations must receive such a construction that it may be upheld. The opinion of Mr. Justice ADAMS holds the law of the State unconstitutional by applying it to imaginary cases, which we have no warrant in saying ever have or ever will occur; by construing

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it to impose burdens on commerce, when it in fact forbids them, and by an interpretation extending it to acts not within its purpose or the purview of its language. The opinion, in my judgment, disregards the doctrine to which I have just referred.

VI. It is not claimed that the statute of the State encroaches upon ground occupied by Congressional enactments. Under the charter of the Union Pacific Railroad Company, and other acts of Congress, the company is required to operate its road as a continuous line. It has been held by the United States Supreme Court, in *Union Pacific R. R. Co. v. Hall et al.*, 91 U. S. (1 Otto.), 343, that the eastern terminus of the road is at Council Bluffs, and that it must be operated as a continuous line to and from that city. In that case a *mandamus* issued by the Circuit Court is sustained, which requires the road to be so operated, and forbids transfers to be made at Omaha. Thus, by the mandates of the Federal Court, the Union Pacific Railroad Company is forbidden to do the act which the State statutes declares shall not be done by the defendant. It will be remarked that the acts of Congress reach only the Union Pacific Railroad Company; they do not forbid other railroad companies to make or receive transfers to or from the Union Pacific Company. The law of this State, in imposing a duty or inhibition on defendant, does not include a subject legislated upon by Congress. Its validity, therefore, is not affected by a Congressional enactment extending to the same subject.

While the decision in this case involves important constitutional doctrines and the exercise of the highest judicial powers, it will, I conceive, be of little practical importance.

The statutes of the United States, as interpreted and enforced in *Union Pacific R. R. Co. v. Hall et al.*, *supra*, compel the Union Pacific Company to operate its road to Council Bluffs as a continuous line and forbid it to transfer freight at Omaha. If it can make no transfer at Omaha, the right of the defendant secured by the decision of this court, to receive freight transferred there, will be a barren right that cannot be exercised.

REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA:

DES MOINES, JUNE TERM, A. D. 1877.

IN THE THIRTY-SECOND YEAR OF THE STATE.

PRESENT:

HON. JAMES G. DAY, CHIEF JUSTICE.
" JAMES H. ROTHROCK,
" JOSEPH M. BECK,
" AUSTIN ADAMS,
" WILLIAM H. SEEVERS. } JUDGES.

45	877
82	572
45	877
84	126
45	377
94	364
45	377
103	531
45	377
108	647
45	377
109	417
45	377
1132	560

YOUNG & Co. v. THE HARTFORD FIRE INS. Co.

1. **Principal and Agent:** UNDISCLOSED PRINCIPAL: INSURANCE. Where a party applied to the agent of an insurance company for insurance, and the agent agreed to write a policy, but nothing was said by either party respecting the company in which the insurance should be effected, and the policy was afterwards written by the agent, *held*, that the agency of the latter was not affected by the fact that the principal was undisclosed.
2. **Insurance: WAIVER OF CONDITIONS OF POLICY: PRINCIPAL AND AGENT.** Where a policy of insurance provides that the company shall not be liable until actual payment of the premium is made, and that no

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agent shall be held to have waived any condition of the policy unless the waiver be indorsed thereon in writing, it is, nevertheless, competent for an agent to bind the company by a parol agreement extending the time of payment of the premium, and, under such agreement, the assured may have a right of action against the company for a loss by fire.

3. ——: PROOF OF LOSS. The acceptance of the proofs of loss by the agent of the company, and the failure to object to them within a reasonable time, precludes it from afterward making objection, either to their form or substance. Any objections to the proofs should be made with reasonable promptitude, so that if they are imperfect they may be corrected.
4. ——: TITLE OF PROPERTY: MISSTATEMENTS OF AGENT. Any misstatements in the policy, respecting the title of the property insured, made by the agent, will not release the company from liability.

Appeal from Polk Circuit Court.

TUESDAY, MARCH 20.

ACTION on a policy of insurance against fire. Performance of all the duties and conditions to be performed by the assured was averred, "except as to the prepayment of the premium, and other conditions, the performance of which was waived by the defendant."

The answer consisted of a denial, and several affirmative defenses were set up, which presented for determination the matters referred to in the opinion.

There was a trial by jury. Verdict and judgment for the plaintiffs, and defendant appeals.

Wright, Gatch & Wright, for appellant.

Smith & Baylies and Connor & Donovan, for appellees.

SEEVERS, J.—I. It is claimed by the plaintiff that insurance was effected by one Warner with Cook & Welling, who ^{1. PRINCIPAL and agent: undisclosed} were insurance agents. Warner met Welling on the street, and made application for insurance; ^{principal:} and what was said at the time by Warner and Welling was admitted in evidence, and it tended to show that Welling agreed to issue a policy of insurance and to extend the time for the payment of the premium; that is, he would give

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Warner credit until a stated time for the premium. Nothing was said, however, by either party as to the company with which insurance should be effected. Warner desired that it should be in a good company, but he left this entirely with Welling, and the latter returned to his office within a short time and wrote up the policy on which this action is brought.

Under such circumstances, the counsel for the defendant insists that Welling, at the time of the conversation in the street, was not acting as the agent of the defendant, and that, therefore, the latter is not bound by what he then agreed or by what then occurred between him and Warner.

It is clear and undisputed that Welling was not acting for himself, but as the agent for some one. This both parties well understood. By issuing the policy the defendant received the benefits of the negotiations, and by every principle of fairness and common honesty is estopped from repudiating the burdens and obligations assumed during the negotiations. If an agent purchases goods for an undisclosed principal, the latter, when discovered, can be made liable on the contract. Story on Agency, Sec. 267.

The mere fact that the principal was not disclosed by no means destroys the agency, when it was understood that Welling was not acting as a principal, and by accepting the benefits, or supposed advantages, the defendant ratifies the agency, and what was done by the agent during the negotiations, and is bound thereby.

II. The policy provides that defendant "shall not be liable until actual payment of the premium, * * * and it ^{2. INSURANCE:} is expressly covenanted by the parties hereto that ^{waver of condition of policy:} no officer, agent or representative of the company and agent shall be held to *have waived* any of the terms and conditions of this policy, unless such waiver shall be indorsed hereon in writing." And the court instructed the jury as follows:

"3. Now, if the jury find from the evidence that the premium was not paid at the time or prior to the issuance of the policy, on the 1st day of April, yet, if you find that the defendant's agent told Warner that he could pay the premium

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at any time within the month of April, and that the policy would take effect from its date, and that Warner relied upon the same, and that both parties treated the same as a valid insurance, then such acts and agreements on the part of the agent would constitute a waiver of the prepayment of the premium, and the fact that the agent failed to indorse such waiver upon the policy will not prevent a recovery in this action."

Cook & Welling were authorized to issue policies without consultation with any officer or agent of the company. They agreed on the risks and premiums, and were furnished with blank policies properly signed, and when written up and countersigned by them such policies became binding on the company. If, therefore, any officer or agent could waive the conditions in the policy in question, there can be no doubt these agents were vested with such powers.

That the prepayment of the premium may be waived by a general agent, even where the policy recites it shall not be binding until the cash portion of the premium is actually paid in money, we regard as settled by the authorities. *Mississippi Valley Ins. Co. v. Neyland*, 9 Bush, 430; *Sheldon v. Conn. Mutual Ins. Co.*, 25 Conn., 207.

It has been held in this State, where the policy provided it should be void in case there was an increase of the risk, unless consent thereto was indorsed in writing on the policy, that such writing was not essential, but that an agent might, by parol, waive the conditions of the policy. *Viele v. Germania Ins. Co.*, 26 Iowa, 9.

The policy clearly implies there may be a waiver of any and all conditions by an agent, but declares that the only evidence of such waiver shall be in writing, indorsed on the policy.

The condition in relation to the payment of the premium seems to forbid a waiver as strongly as the condition that whatever is done in this respect shall be expressed in writing on the policy. Both are undoubtedly inserted at the instance of the defendant; and why may not the writing be waived just as well as the prepayment of the premium? The one is no more sacred or obligatory than the other, and both, it may be said, are equally binding. The failure to pay the premium

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does not render the policy absolutely void, but only so at the option of the defendant, and if delivered to the assured a presumption is raised that a short credit was intended. *Brohm v. Williamsburgh Ins. Co.*, 35 N. Y., 131. If the agent, by his acts, leads the insured to defer payment of the premium until it is called for, and a loss occurs before such demand is made, the company is bound. *Trustees of Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y., 305; *Bowman v. Agricultural Ins. Co.*, 59 N. Y., 521.

The policy does not contain any limitation on the power of the agent to waive the conditions, but only prescribes the way or manner the waiver shall be evidenced. It may be said to be a notice to persons doing business with the company, and if brought to the attention of the assured before the policy is delivered, it might be regarded as obligatory on him. But such a notice in a delivered policy cannot have such an effect. *Per Comstock, J.*, in *Trustees Baptist Church v. Brooklyn Insurance Co.*, *supra*.

In the present case an agent with large discretionary powers writes up and delivers the policy which contains the condition just referred to, and at the same time agrees to extend a short credit for the payment of the premium; under such a state of facts the assured had the right to suppose all conditions precedent to the taking effect of the policy had been waived. If such a policy be held void it would be sanctioning something nearly akin to a fraud; especially is this true in this case, where the assured had no actual notice of the conditions in the policy. That he was bound in a legal sense to know may be conceded.

When the policy was delivered the contract was complete, and if the agent by his agreement or conduct misled the assured, and thereby induced him to accept the policy under the belief there had been a waiver of all conditions precedent, and delivered the policy, the defendant is estopped thereby. *Westchester Fire Insurance Company v. Earle*, 33 Mich., 143.

If it be said the assured may in all cases protect himself by seeing that the requisite indorsement is made on the policy,

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it may be well replied that the company can protect itself by declining to deliver the policy until the conditions precedent to its taking effect are performed. Or, if it be said the policy in question was delivered by an agent and not by the company, it may be replied thereto that there was no absolute necessity to vest the power to deliver the policy in the agent, but having done so the defendant should be bound to the same extent as if the delivery had been made by the president or board of directors of defendant. Certainly this condition is not unalterable, and it must be true that the same power that prescribed it may waive its performance.

The action in *Wright v. Hartford Fire Insurance Company*, 36 Wis., 522, was on a policy precisely like the one in the present case, and it was there held that the condition we have been discussing might be waived by the acts, conduct and knowledge of the agent, though no written consent was indorsed on the policy. The views herein expressed are fully in accord with *Viele v. Germania Insurance Company*, *supra*. Indeed, if that case is followed to its logical results it is decisive of the main question in this case; for it must be obvious there can be no distinction, so far as the company is concerned, between the waiver of conditions precedent to the taking effect of the policy, and those subsequent thereto, except as to the former the company can at all times protect itself by declining to deliver the policy, while in the latter such protection cannot be so readily obtained, or the power of agents to waive such conditions so effectually guarded.

III. There was evidence tending to show a delivery of the policy. In fact, if the evidence of Warner, in connection with that of Welling, as to the entries in the books of the company, was believed by the jury, there is no question as to there being a completed contract of insurance, and also a delivery of the policy.

It is not specially urged that the verdict in this respect is against the evidence. Under the well established rules in this respect such an objection could not be successfully urged.

Nor are the instructions of the court as to under what circumstances the contract should be deemed complete, or whether

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it was essential there should or must be a delivery of the policy before there could be a valid contract of insurance, objected to. In fact, no such objection could be successfully urged, for the reason that the law applicable to the claimed facts as laid down by the court is undoubtedly correct. The finding of the jury as to the facts is conclusive and cannot be reviewed by us.

IV. Having determined it was competent to show a parol waiver of the conditions of the policy, it necessarily follows that the evidence introduced against the objection of the defendant which tended to so prove was properly admitted, and that the objection urged in this court in reference thereto is not well taken.

V. By the terms of the policy the loss, in case one occurred, was not payable "until sixty days after due notice, and satisfactory proofs of the same." It is said the proofs of loss were fatally defective. This may be admitted.

The loss occurred in April, 1874; immediately thereafter the defendant was enjoined, and during the continuance of the injunction could not settle or adjust the loss. The parties to that controversy on the 15th day of May, 1874, settled and adjusted the matters between them. This adjustment amounted to a dissolution of the injunction, but no formal entry was made on the records of the court until August afterwards. The agents, Cook & Welling, were informed of the settlement on the 16th day of May, and on the 12th day of June proofs of loss were made out and delivered to Cook & Welling, and the evidence tended to show such proofs were deemed satisfactory by them. No objection was made to the proofs so furnished until August 21st, 1874, at which time a letter was written the assured, making certain objections thereto. Good faith required that, if the proofs were not satisfactory, notice should be given the assured to that effect, within at least a reasonable time.

Objections of this kind are technical and without substantial merit, and the insurer should make such known with reasonable promptitude to the end that they may be perfected if possible.

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The fact there had been no formal entry of the dismissal of the injunction did not, in our opinion, form a sufficient excuse. To all intents and purposes the injunction was dissolved when the settlement was made. The objections to the proofs were made too late, and cannot be urged to defeat this action.

VI. The evidence tended to show that at the time insurance was applied for defendant's agents were fully informed of the title condition of the title to the real estate, and such agents wrote the policy, and the assured had no actual knowledge of the statements made therein as to the title until after the loss occurred. It is now said the policy did not accurately describe the title of the assured. If this be conceded it would constitute no defense, as was held by this court in *Hingston v. Etna Ins. Co.*, 42 Iowa, 46. It therefore follows there was no "fraud or attempt at fraud or false swearing" on the part of the assured.

AFFIRMED.

ADAMS, J., having been of counsel in the case, took no part in the decision.

DUNBAR V. STICKLER ET AL.

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93 445
45 384
115 39
45 384
118 379

1. **Conveyance: EXPRESSED CONDITION.** Where a conveyance is made upon a condition, the condition expressed in the deed must be conclusively presumed, in the absence of fraud, accident or mistake, to be the only condition, and if that is kept the title cannot be assailed.
2. **— : — : TIME OF PAYMENT.** Where the time of payment fixed in a deed is upon a day specified "if required or demanded," a reasonable time is allowed after demand in which payment may be made.
3. **— : — : CONSIDERATION.** A conveyance will not be deemed voluntary and improvident when made in consideration of an agreement for the payment of money which is enforceable in an action at law.

Appeal from Dubuque District Court.

TUESDAY, MARCH 20.

Action in equity to set aside a deed. The plaintiff, George Dunbar, and his wife, Margaret Dunbar, executed the deed

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in question to their son-in-law, John Stickler. The consideration expressed in the deed is \$10,000. In the deed is a condition in the following words:

"Now, if the said John Stickler shall pay or cause to be paid to the said George Dunbar or Margaret Dunbar, his wife, interest on the ten thousand dollars herein expressed at the rate of six per cent per annum, interest payable annually, if required or demanded, during the lifetime of said George or Margaret Dunbar, then this deed *vests* in said Stickler the title fee simple absolutely upon the death of said George and Margaret Dunbar, to all the lands above described. But should George or Margaret Dunbar survive the said Stickler, then and in that event the heirs of said John Stickler are to assume and perform the conditions above set forth as fully and faithfully as if he, the said John Stickler, were alive to perform the same, and a failure on their part to do so will vitiate and render this conveyance void.

"The intention of this conditional conveyance is to make the title to all the lands set forth and described in the same absolutely perfect in John Stickler upon the decease of George and Margaret Dunbar."

After the execution of the deed the said John Stickler died intestate, leaving as his only heir the defendant, George Stickler.

The plaintiff avers, in substance, that it was agreed between him and the said John Stickler that said John Stickler would furnish him a home as a part of the consideration of said deed, and that said John Stickler and his heirs have failed to do so. He also avers, in substance, that on the day the sum of \$600 became due, as provided in the deed, he demanded it of the defendant, George Stickler, who refused to pay the same or any part thereof. The fact in regard to such demand and refusal is, that at the end of the year, from the time of the execution of said deed, the said George Stickler had been sick and was then recovering; the plaintiff demanded the \$600 as he alleges; the defendant replied that he did not have the money by him, but would get it as soon as he could; the next day the defendant procured the money and offered it to

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the plaintiff, but the plaintiff declined to accept it; he claims the right to avoid the deed on the ground that the money was not offered when due; and that neither John Stickler nor his heirs have provided him a home as was verbally agreed; he also claims that the conveyance was voluntary and improvident, and may for that reason be set aside. Decree for defendant. Plaintiff appeals.

McNulty & McCeney, for appellant.

Myron H. Beach, for appellee.

ADAMS, J.—I. Where a conveyance is made upon a condition, the condition expressed in the deed must be conclusively

1. CONVEY-
ANCE: ex-
pressed con-
dition. presumed (in the absence of fraud, accident or mistake) to be the only condition, and if that condition is kept the title cannot be successfully assailed. To engraft upon the condition expressed in the deed another by parol would be to vary by parol the legal effect of the deed. That this cannot be allowed is substantially held in *Isett et al. v. Lucas*, 17 Iowa, 503. See, also, *Henderson v. Henderson*, 13 Mo., 152. For some purposes the consideration may be shown to be different from that which is expressed. But the rule is that this cannot be allowed for the purpose of avoiding the deed or varying its effect. If there are exceptions they are in cases involving principles peculiar to themselves. For instance, the consideration has been allowed to be shown to be more than that expressed to avoid a deed upon the ground that it was improperly stamped.

The case at bar is an ordinary case of a conveyance, where the title was not to become absolute except upon the payment of an annual sum during the grantor's life. To allow the condition to be enlarged by engraving thereon by parol the further condition that during the same time the grantor was to be furnished with a home, would be equally as objectionable as to allow it to be enlarged by evidence in parol that the annual sum to be paid was greater than that expressed.

The appellant cites *Porter v. Dubuque*, 20 Iowa, 440, as

Dunbar v. Stickler.

containing the doctrine upon which he relies. In that case the creditor of a municipal corporation had an interview with a committee of the common council, in relation to the adjustment of his debt, and the committee made a report in writing to the council of the terms upon which the debt could be discharged. It was held, in an action upon the debt, that the introduction of the report in evidence did not preclude the defendant from showing the conversation at the interview. The report was not a written instrument to which the creditor was a party.

II. The condition expressed in the deed has, we think, been substantially performed. The deed was executed upon 2. —: —: the 25th day of November, 1873. The sum of \$600 provided therein to be paid did not become payable before November 25, 1874, nor did it become payable upon that day by simple lapse of time. It was to be payable "if required or demanded." On that day it was, to be sure, demanded, and was not paid nor tendered until the succeeding day. But we do not think that the title was forfeited. To hold that it was would, in our opinion, be placing an improper construction upon the deed. The money was not payable until demanded. We cannot think that a forfeiture should take place immediately upon non-payment of money not due until demanded, unless such forfeiture is expressly provided for. An inspection of the deed in question will reveal no such intention. In *Hayden et al. v. Stoughton*, 5 Pick., 534, PURNAM, J., speaking of forfeiture, says: "Where no particular time is mentioned for the performance of a condition subsequent, the law requires that it should be done within a reasonable time." In the case at bar the deed had been executed and delivered. It was not contemplated that any other instrument should be executed to pass the title. It had already passed subject only to be defeated by the non-performance of the condition. An application is now made to a court of equity to re-vest it. If it can be done at all it must be done upon equitable grounds. By the condition, the \$600 was to be paid annually if demanded. It is clear that if the grantee had agreed simply to pay \$600 if demanded,

Dunbar v. Stickler.

he would have a reasonable time after demand in which to pay it before any equitable ground could exist for declaring a forfeiture of the title conveyed by the deed. As the obligation to pay annually was made to depend upon demand, we think that the same rule should apply. The construction contended for by the appellant would require the grantee to hold himself in readiness by keeping a fund on hand to prevent a forfeiture. The plaintiff might demand the money, or any part thereof, at any time after the same was demandable. That is the meaning of the condition. The plaintiff made what he deemed a provision for his wants, and the deed must be interpreted in the light of such purpose. The lapse of a single day after demand was not, under the circumstances shown, an unreasonable delay of payment, and the relief asked cannot be granted upon that ground.

III. The appellant contends that the conveyance is voluntary and improvident, and that it should be set aside for that ^{s. — : —} reason. Upon this point our attention is called ^{considera-} to *Garnsey v. Munday*, 24 N. J., 243. How far a court should go in setting aside a conveyance, at the instance of the grantor, on the ground that it is voluntary and improvident, we need not stop to inquire. The plaintiff avers in his petition that in consideration of the conveyance the said John Stickler agreed to pay him \$600 a year. Possession was taken by John Stickler, as grantee, and upon his death by the defendant, George Stickler, as his heir. Such an agreement is enforceable, although not expressed in the deed. *Trayer v. Reeder*, 272, *ante*. The conveyance, therefore, was not without consideration.

IV. As the defendant has tendered to plaintiff two sums of \$600 each, we think he should have a judgment for \$1200 without interest or costs. With this modification, the decree of the District Court should be

AFFIRMED.

The State v. Walters.

THE STATE V. WALTERS.

1. **Criminal Law: ASSAULT WITH INTENT TO COMMIT RAPE: EVIDENCE.** Under an indictment for assault with intent to commit rape, evidence of previous assaults upon the prosecutrix is admissible to show the intent with which the act charged was committed.
2. _____: EVIDENCE: ANOTHER OFFENSE. Evidence of another distinct substantive offense is not admissible to establish defendant's guilt of the offense laid in the indictment.
3. _____: PRACTICE: INSTRUCTION. It is the duty of the court to instruct the jury that if they have a reasonable doubt of the degree or character of the assault, they should only convict of a lower degree of crime included within that charged in the indictment.

45	389
88	28
45	389
100	196
100	228
45	389
109	76
45	389
112	465
45	389
119	333
119	687
45	389
127	77
45	389
140	474

Appeal from Allamakee District Court.

TUESDAY, MARCH 20.

THE defendant was indicted, tried, convicted and sentenced, for an assault with intent to commit a rape upon the person of one Mina Shepard. Defendant appeals.

Dayton & Dayton, for appellant.

M. E. Cutts, Attorney General, for the State.

ROTHROCK, J.—I. The indictment charges that the alleged crime was committed about June 1, 1874. The complaining witness in her testimony detailed an assault which she alleged the defendant committed upon her in June or July, 1874, while on the way from defendant's residence to the village of Waukon. She also testified to a number of other assaults of the same character, some of which occurred sometime prior to finding of the indictment. Objection was made to any proof of assaults unless confined to the time specified in the indictment, and to a time within the statute of limitations. The objection was overruled and exceptions taken. To the introduction of this evidence we believe there can be no valid objection. In an indictment for an assault with intent to commit a rape, evidence of previous

The State v. Walters.

assaults on the prosecutrix is admissible to show the intent with which the act charged was committed. Wharton's American Criminal Law, 301.

II. The State introduced as a witness one Dora Shepard, who testified that the defendant had repeatedly assaulted her ~~2. — : evi-~~ with intent to commit rape. The assaults which ~~dence: another offense.~~ she testified to have no connection whatever with the alleged assault committed upon the complaining witness, and some of them occurred several years before the indictment was found. Objection was made to this evidence, which was overruled and proper exceptions taken.

This ruling of the court was erroneous. It is a general rule that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue. Evidence of a distinct substantive offense cannot be admitted in support of another offense. Proof of some other felony committed at a different time and upon or against another person, and having no connection with the crime charged, is not admissible. Whatever exceptions there may be to this rule in cases where distinct transactions are allowed to be shown, to establish the *scienter* or *quo animo*, we think this evidence is not of that character. Counsel for the State has cited us to no authority sustaining the ruling of the court below in admitting this evidence, and we have been unable to find any adjudicated case which supports such rule.

III. The court gave to the jury the following instruction: "The form of your verdict will be, "we, the jury, find the ~~3. — : prac-~~ defendant guilty; or, we, the jury, find the defendant ~~instruc-~~ ant not guilty."

The instructions did not inform the jury that it was competent for them, under the indictment, to find the defendant not guilty of the crime charged, but guilty of an assault, or an assault and battery, if they should believe from the evidence that such finding would be proper; nor were they advised that if they had a reasonable doubt of the degree or character of the assault, that they should only convict of the lower degree. Code, Sec. 4429. The instruction above quoted excluded from the consideration of the jury a material issue in the case, and

The Ind. School Dist. of Lowell v. The Ind. School Dist. of Duser.

compelled a verdict either of guilty as charged in the indictment or not guilty. We think this is erroneous.

There are other alleged errors, some of which present important questions; but as no argument has been made upon the part of the State, and as the cause must be reversed for the errors above enumerated, we will not consider them.

REVERSED.

THE IND. SCHOOL DIST. OF LOWELL v. THE IND. SCHOOL DIST. OF DUSER.

1. Schools: SUBDIVISION OF DISTRICT TOWNSHIP: APPORTIONMENT OF ASSETS. Upon the subdivision of a district township into independent districts, the directors of the district township are authorized to apportion the assets and liabilities, and it is only upon their failure to agree that the matters in dispute are to be referred to arbitrators. The consent of the various independent districts is not necessary to the jurisdiction of the district directors.
2. ——: JURISDICTION: ADJUDICATION. The adjudication of the directors of the district township in the apportionment of assets and liabilities is final and conclusive until set aside by proper proceedings, and cannot be attacked collaterally.
3. ——: ——: APPEAL TO COUNTY SUPERINTENDENT. An appeal will lie from their adjudication to the county superintendent, whose decision is binding upon the parties and may be enforced by action at law.

Appeal from Wapello District Court.

TUESDAY, MARCH 20.

THE district township of Competine was reorganized into independent school districts, plaintiff and defendant being among the number of independent districts thus created. Upon a division of assets and liabilities made by the directors of the district township, as provided by law (Code, Secs. 1715, 1820), the defendant was required to pay to plaintiff the sum of \$100, in order to adjust, equitably, the rights of the respective new organizations. To recover this sum, with interest,

The Ind. School Dist. of Lowell v. The Ind. School Dist. of Duser.

the action now before us was brought. Upon a trial to the court, without a jury, judgment was rendered for plaintiff. Defendant appeals.

William McNett, for appellant.

W. H. C. Jaques, for appellee.

BECK, J.—The proceedings of the directors of the district township, in making the distribution of its liabilities and assets among the newly created independent districts, were regular, at least no objection is made to the form of the proceedings or the jurisdiction of the tribunal acting in the matter. The only questions made in the case involve the effect to be given to the action and decision of that tribunal, composed of these directors.

I. The petition of plaintiff declares upon the award and decision of the directors, requiring the defendant to pay plaintiff the sum of \$100. To the petition defendant answered, setting up, among other defenses, that it never assented to or agreed to be bound by the action of the directors, but always protested against the same as being illegal and inequitable; that plaintiff, well knowing this, took no steps and made no proposition to arbitrate the matters in difference between the parties, as provided by law, prior to the commencement of this action, and that defendant never refused to submit the differences to arbitration but proposed so to do on its part. As a further defense it is alleged that the directors had no authority to determine that defendant should pay the sum awarded, or any other sum, so as to give plaintiff a right of action therefor, "nor would plaintiff, in any event, be entitled to recover until it had exhausted its remedy by arbitration or proposal to arbitrate, and only then by showing that the amount claimed was equitably due, upon an equitable distribution of assets." Another count of the answer sets up facts upon which it is claimed that the action of the directors did not result in a fair and equitable division of the assets and liabilities of the districts, and that defendant, under a just distribution of the property of the district, instead of being required to pay to

The Ind. School Dist. of Lowell v. The Ind. School Dist. of Duser.

plaintiff the sum of \$100, would receive from other independent districts \$129.

A demurrer to the counts of the answer containing these defenses was sustained. This ruling of the District Court constitutes the main ground of objection presented for our consideration by defendant's counsel. We are of the opinion that the demurrer was correctly sustained.

II. Upon the organization of independent districts and the abandonment of the district township, the directors of the last

1. schools : subdivision of district township : apportionment of assets. named corporation are, by the statute, constituted a tribunal for the distribution of its assets and liabilities among the newly created districts. Code, Secs. 1820, 1715. The last section cited contains this sentence, upon which a question of construction is raised by defendant: "The respective boards of directors shall, immediately after such organization [of the independent district], make an equitable division of assets and liabilities between the old and new districts; and, in case of failure to agree, the matter may be decided by arbitrators, chosen by the parties."

Defendant insists that, under this provision, if the independent districts do not *agree*, assent to the distribution made by the directors, an arbitration must be had in order to settle their differences. But this, most obviously, is not the meaning of the language of the latter part of the quotation. The disagreement therein provided for is not of the newly created districts, but of the *directors* of the districts who make the distribution—the disagreement in the tribunal acting upon the matter before them. The conclusion is so apparent that further consideration of the question is not demanded. The fact, then, set up in the answer, that no arbitration was had or demanded by plaintiff constitutes no defense to the action.

III. We are next required to determine the effect of the action of the directors in making the distribution of assets and 2. — : jurisdiction : adjudication. liabilities. The directors constituted, under the law, a special tribunal to determine questions growing out of the equitable distribution of assets and liabilities of the district township among the independent districts succeeding it. Their determination of these questions and their

The Ind. School Dist. of Lowell v. The Ind. School Dist. of Duser.

final action upon the subject intrusted to their jurisdiction, as the adjudication of all other tribunals created by law, were final and conclusive until reversed by proper proceedings, and cannot be attacked in collateral actions. Code, Secs. 1820, 1715; *Dist. Tp. of Viola v. Dist. Tp. of Audubon*, p. 104, *ante*; *Ind. District of Oakville v. Ind. Dist. of Asbury*, 43 Iowa, 444; *Ind. Dist. of Georgia v. Ind. Dist. of Victory*, 41 Iowa, 321.

The facts set out in defendant's answer, if admitted, establish error in the decision of the directors, and nothing more; but decisions of tribunals of this character cannot be questioned for error in collateral proceedings brought to enforce them. The matters pleaded by defendant constitute no defense to this action; the demurrer was properly sustained.

IV. It is argued that the decision of the directors cannot be final and conclusive, in an action to enforce it, because there ^{3. —: —:} can be no review of their action on appeal to the ^{appeal to county super-} county superintendent. But the premises upon ^{intendent.} which this argument is based cannot be admitted. Appeals, in all cases of law and fact, may be taken from the directors to the county superintendent. Code, Sec. 1873; *Vance v. Dist. Tp. of Wilton*, 23 Iowa, 408; *Ind. District of Granville v. Board of Supervisors*, 25 Iowa, 305.

But it is insisted that, as the county superintendent could not render a judgment upon an appeal in the exercise of judicial authority, the action of that officer would conclude neither party. While his final action would not be in the nature of a judgment, upon which process for the collection of the amount awarded to the party recovering could issue, it would be a decision binding upon the parties. In that case, the remedy for the collection of the amount awarded would be by action. No other remedy is given upon the decision of the directors.

The record fails to show error in the judgment of the court, rendered upon the evidence submitted under the issues joined upon the pleadings. It is, therefore,

AFFIRMED.

Wadsworth v. Walliker.

WADSWORTH & Co. v. WALLIKER.

1. **Execution: RELEASE OF ATTACHED PROPERTY: SHERIFF.** An officer who holds goods in his possession under a writ of attachment may, at his discretion, release the same upon the claim of a third party that he is their owner; but the officer does so at his peril, and he has the burden of establishing that the attached property did not belong to the execution defendant.
2. _____: _____: EVIDENCE. In an action for damages against the officer for the release of the property, the latter may introduce evidence to show that the execution defendant was not the owner of the attached property.

Appeal from Clinton Circuit Court.

WEDNESDAY, MARCH 21.

THE plaintiffs allege that in December, 1874, they commenced an action in the Clinton Circuit Court against G. H. Parkinson to recover \$295.67, and caused a writ of attachment to issue and to be levied upon the property of said Parkinson; that on the 18th day of December, 1874, the defendant, J. H. Walliker, sheriff of Clinton county, in virtue of said writ of attachment levied upon twenty-six boxes of goods, as the property of Geo. H. Parkinson, said boxes marked "Mortimer Rice, Maquoketa;" that the defendant without any order of court or direction of plaintiff unlawfully released said goods from the lien of the attachment, and allowed the same to be removed beyond his custody or control; that plaintiffs have prosecuted their claim against Parkinson to judgment, and that by reason of the release of said property they have been unable to collect anything on their judgment, which is wholly unpaid. Plaintiffs ask judgment against defendant on his bond for the sum of five hundred dollars.

The defendant, for answer, alleges that the writ of attachment was in the hands of his deputy, and that all that was done thereunder was done by the deputy; he denies that the twenty-six boxes of goods levied on and mentioned in the petition were at the time of the levy the property of the said

Wadsworth v. Walliker.

Parkinson, and denies that the release was unlawful. The answer alleges that at the time of said levy and release the title to said property was in fact in one Mortimer Rice, who was in the possession thereof, and was the absolute owner of the same.

The cause was tried by the court and judgment was rendered in favor of plaintiff for \$331.98, and costs. The defendant appeals. The material facts are stated in the opinion.

Aylett R. Cotton, for appellant.

Martin & Murphy and *Geo. B. Young*, for appellee.

DAY, CH. J.—The facts are as follows: On the 18th day of December, 1874, the twenty-six boxes of goods levied upon were at the depot in De Witt, marked "Mortimer Rice, Maquoketa, Iowa," and were awaiting shipment to that place. On that day Wm. A. Lynch, an attorney of Davenport, came to the depot with a petition in attachment, an attachment bond, and an indemnity bond, with a view of attaching property of Geo. H. Parkinson, on a claim of \$295.67, in favor of plaintiffs. He found Dearborn, the deputy sheriff, just in the act of levying a writ of attachment upon said property, to satisfy a claim of Philip Gohlman v. Parkinson, for the sum of \$200; some boxes having been selected out for the purpose of levy, but no return having been made upon the writ of attachment. A. Howat, of the firm of Merrill & Howat, attorneys for Gohlman, was present, and at the solicitation of Lynch was induced to consent that the attachment of Gohlman should be levied upon all the twenty-six boxes of goods, and that they should be held under that levy until Lynch could go to Clinton and procure a writ of attachment under plaintiffs' claim. The deputy sheriff was induced to so make the levy at the solicitation of Lynch and Howat, Lynch agreeing to indemnify the sheriff for what might be done. Lynch went to Clinton, procured a writ of attachment and returned, and about six o'clock in the evening of the same day the writ was levied upon the twenty-six boxes of goods. Lynch tendered Dearborn for the use of defendant an indem-

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nifying bond in the penal sum of \$900, reciting that it was for the purpose of holding Walliker harmless from damages and loss for levying upon property to the extent in value of \$450. Dearborn objected to the bond and said he wanted a bond for \$3,000, which Lynch agreed to give. This occurred on Friday. On Saturday Lynch returned to Davenport and procured the assent of the sureties upon the bond to fix the penalty at \$3,000, but the recital that the bond was for the purpose of holding Walliker harmless for attaching property to the extent of \$450 was unchanged. This bond was returned to Dearborn by mail on Monday. Merrill & Howat had also agreed to execute an indemnifying bond in the amount of \$3,000, on account of the Gohlman attachment. In the meantime Mortimer Rice served upon Dearborn a notice that he claimed the property, and soon thereafter he commenced a suit against the sheriff and his sureties for \$4,500, on account of levying the attachment. Merrill & Howat neglected to execute any indemnifying bond. Afterward defendant offered to release to Rice ten boxes of goods, and to retain simply enough to satisfy the attachments. Rice refused to accept a part of the goods, and thereupon defendant released all, and the action for damages was withdrawn.

The defendant sought to prove who was the owner of the attached property on the 18th day of December, 1874. This testimony was objected to by the plaintiffs for the reason that they seek to recover in this case by reason of having indemnified the officer against holding the goods levied on; and, inasmuch as the officer was indemnified, the defendant is concluded and estopped from showing as a defense that the property belonged to any other person than the attachment debtor. The objection was sustained, and the action is assigned as error.

In sections 3055, 3060, are found the provisions respecting an indemnifying bond. These sections relate exclusively to the levy of an execution and have no reference to an attachment. They provide that an officer is bound to levy an execution upon property in the possession of, or that he has reason to believe belongs to, the defendant, or on which plaintiff

Wadsworth v. Walliker.

directs a levy unless he has received notice in writing from some other person that the property belongs to him; and that if he receives notice after levy he may release the property unless bond is given, and that the officer shall be protected from all liability until he receives such notice. When bond is given as required, to the approval of the officer, he shall proceed to subject the property to the execution, and the claimant or purchaser of the property shall be barred of any action against the officer, if the surety on the bond was good when taken, but they may maintain an action upon the bond.

Appellee insists that it is immaterial whether the above sections apply to the case of an attachment or not, since the bond was given, and is good as a common law bond. Citing *Sheppard & Morgan v. Collins*, 12 Iowa, 570; *Garretson v. Reeder et al.*, 23 Id., 21; *Cole v. Parker*, 7 Id., 167.

It may be admitted that the bond in question is good as a common law bond; but if it is a bond not authorized by the statute its effect can not be determined by the release of attached property statute. There is no statutory provision as to this sheriff's bond that the officer must hold the property at all events, and that the claimant or purchaser of the property shall be barred of any action against him. Being a common law bond its effect must be determined, not by statute, but by common law principles. If the officer had retained this attached property he would have been compelled to answer for its value to Rice, if he had succeeded in establishing his ownership of the property. Being thus made liable to Rice he would have had his action over against plaintiffs for the amount of recovery against him. In other words, whatever plaintiffs made out of the property attached, they would be obliged ultimately to answer for to the defendant as damages on the bond. In the absence of any statutory provision we do not see why the officer may not, at the peril of showing the real ownership of the property, discharge the attached property, whilst the writ of attachment is yet in his hands, and thus prevent this circuity of action. Of course, under such circumstances, the burden of proof would be upon the officer to show that the attached property did not belong to the

Wadsworth v. Walliker.

attachment defendant. This view, it seems to us, is clearly right in principle, and it is not without support in authority.

In *Commonwealth v. Vandyke*, 57 Penn. St., 34, which was an action against a sheriff and his sureties upon an official bond, the court say: "It may certainly be considered as settled by the case of *Commonwealth v. Watmough*, 6 Wharton, 117, that in an action against the sheriff for a false return of *nulla bona*, to a writ of *fieri facias*, unless it appears that the property pointed out by the plaintiff actually belonged to the defendant in the execution, an offer to indemnify him will not make him liable in damages. This decision is not in the least shaken by *Connelly v. Walker*, 9 Wright, 449, for although *WOODWARD*, Ch. J., in that case animadverted severely and justly on the conduct of the officer, in making the return to the writ that the property was claimed by certain persons who had given bond, which plainly was no legal return, yet it was not denied that the sheriff could show title in those persons, and the court proceeded to examine the questions arising upon that title." The case of *Connelly v. Walker* is cited and relied upon by appellee, but as explained by the subsequent case of *Commonwealth v. Vandyke*, it is an authority against the view for which appellee contends. In *Lummis v. Kasson*, 43 Barb., 373 (376) it is said: "It was held, however, by the Supreme Court of this State in *Bayley v. Bates* (8 John., 185), and *Van Cleef v. Fleet* (15 Id., 147), that if the plaintiff in the execution tenders a sufficient bond of indemnity to the sheriff an inquisition will not justify that officer in returning that the defendant has no goods, if the fact turn out to be otherwise. This is upon the ground that the inquisition is not conclusive of the right of property, but is merely designed to protect the officer, and the indemnity, when tendered, has the same effect. But even after a levy and an inquisition finding the goods to be the property of the defendant, I apprehend the sheriff is at liberty to return *nulla bona*, provided he acts in good faith; but in so doing he assumes the responsibility of proving property out of the defendant in the execution, and thus supporting his return. And I think it reasonable to hold that he may make the same

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return after indemnity, but in so doing he assumes the like responsibility; and this is what is meant by the expression in the books that in such cases he acts at his peril." Citing 8 Cowen 65; 5 Wend., 309; 7 Id., 236. See also *Fuller v. Holden*, 4 Mass., 498; *Denny v. Willard*, 11 Pick., 519; *Tyler v. Ulmer*, 12 Mass., 164; *Learned v. Bryant*, 13 Mass., 224; *Potts v. Commonwealth*, 4 J. J. Marsh., 202. Without an attempt at a review of the authorities which may seem to indicate an opposite view, it is sufficient to say that the doctrine of these cases receives our full approval.

We are clearly of opinion that the court erred in rejecting proof of the ownership of the attached property, even if 2. — : — : defendant was indemnified, of which we entertain evidence. great doubt under the testimony. What we have said will not be understood as having reference to a statutory indemnifying bond under execution. The effect of accepting such bond is prescribed by statute.

REVERSED.

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111 187

45 400
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LOOMIS ET AL. V. BAILEY ET AL.

1. **County Seat: RELOCATION OF: POWER OF SUPERVISORS.** The board of supervisors are not authorized, after a petition and remonstrance have been presented to them respecting a change in the location of a county seat, to consider an application by any number of the signers that their names be stricken from the remonstrance.
2. — : — : **PETITION.** To entitle the applicants to a submission of the question to the people, the number of signers to the petition should not only be at least one-half the legal voters of the county, but should also be greater than the number of remonstrants thereto.

Appeal from Delaware Circuit Court.

WEDNESDAY, MARCH 21.

THE plaintiffs, voters of Delaware county, petitioned the board of supervisors to submit to the electors of the county the question of the relocation of the county seat, whether it should be removed from Delhi to Manchester. Proof of the

Loomis v. Bailey.

genuineness of the signatures and the qualifications of the signers accompanied the petition. A remonstrance against the removal of the county seat was presented to the board of supervisors, which was also accompanied by proof of the qualifications of the signers and the genuineness of their signatures. At the same time another paper was presented to the supervisors, called a *re-petition*, signed by 418 voters, which states that the names of the signers thereof are affixed to the remonstrance, but their signatures were procured through misapprehension of facts. The signers of this paper asked that their names be stricken off of the remonstrance, and they expressed the desire that the question of the removal of the county seat be submitted to the electors of the county. Upon the consideration of the petitions and the remonstrance, the board of supervisors refused to submit to the voters of the county the question of the relocation of the county seat.

Thereupon a writ of *certiorari*, upon petition of plaintiffs, was allowed by the judge of the Circuit Court, directed to defendants, the supervisors of Delaware county, who made return thereto, showing the proceedings had before them and their action upon sundry questions arising in the case, as well as their final decision.

Upon the trial in the Circuit Court, the rulings of the supervisors upon certain questions were affirmed, and upon another reversed, and the cause was certified back with directions that the petition and remonstrance be again considered and recanvassed, in compliance with the law as determined by the court. From this decision plaintiffs appeal. The further facts of the case involved in the points ruled in the opinion of this court appear therein.

A. S. Blair, Calvin Yoran, Chas. F. Bronson and E. M. Carr, for appellants.

J. M. Brayton, for appellees.

BECK, J.—I. In determining the number of petitioners for the relocation of the county seat and remonstrants against it,

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the supervisors refused to consider the paper presented to them, and which is designated by both parties in their pleadings and arguments as a *re-petition*. This was signed by persons who had remonstrated against submitting the question to the voters of the county—whose names appeared upon the remonstrance submitted to the supervisors. This action was held correct by the Circuit Court, and the ruling is made the first ground of objection to its decision.

The proceeding before the board of supervisors for the relocation of the county seat is special in its character. The <sup>1. COUNTY
seat: reloca-
tion of: pow-
ers of super-
visors.</sup> tribunal is clothed with no other powers than those conferred by the statute creating it. It will be discovered that these powers are few and easy of comprehension. They are these and no others:

1. The reception of petitions and remonstrances.
2. To determine the genuineness of the signatures, and whether the signers be legal voters.
3. To count those persons who both petition and remonstrate, as remonstrants only.
4. To determine whether the number necessary to authorize the submission of the question to the electors of the county, petition therefor.
5. To order an election if the petition be signed by the proper number of voters, or to refuse so to do if the petitioners be not the number required by law. Code, §§ 282, 283, 285.

The supervisors are required by the statute to act upon the petition and remonstrance, after the qualification of the signers as voters and the genuineness of their signatures have been determined. They have no power to inquire into the circumstances under which signers thereto affixed their names, or whether, after they had done so, their views, wishes or wants had changed. They were not, therefore, authorized in this case to consider the application of those persons who signed the paper called the *re-petition* to have their names stricken from the remonstrance, and to be regarded as petitioners for the relocation of the county seat. The wisdom of so restricting the power of the supervisors will plainly appear when it is considered to what extent of investigation, and the uncertainty

Loomis v. Bailey.

thereof, they might be led. If remonstrants, upon change of their wishes, may require the effect of papers upon which the supervisors are to act to be correspondingly changed, so may petitioners. If one change be made, two may, and upon another change of mind the petitioners and remonstrants may require the supervisors to count them on the side they first espoused. Not only would there be almost interminable investigation and great confusion in the business, but invitations would be given to the partizans of the different localities to call to their aid all influences which might tend to change the mind of a voter. These county seat contests are now attended with great bitterness, and sometimes charges have been made of unfair practices therein. The peace of communities and the good of the people forbid that new methods of increasing this bitterness, and other opportunities for unfairness, be introduced into these contests.

II. The number of signers to the remonstrance exceeded the number of names upon the petition. But the number of ~~2~~ ____ : ____ signers to the petition exceeded a majority of legal petition. ____ voters of the county, as shown by the last preceding census. Counsel for appellants insist that, upon finding this fact, the supervisors should have ordered the election. The Circuit Court held that, to authorize the supervisors to order the election, the petitioners therefor should exceed the number remonstrating against it, and be at least one-half of all the legal voters in the county as shown by the last census. We think the view entertained by the Circuit Court is clearly correct. The section of the Code (285) upon which appellants rely, provides, that upon the presentation of a petition "signed by at least one-half of all the legal voters of the county, as shown by the last preceding census," and other prerequisites having been complied with, the supervisors shall order a vote to be taken at the next general election upon the question. This section provides that the vote cannot be ordered upon a petition having a less number of signers than is prescribed therein, and that it may be ordered upon that number. But, § 283 provides that, "if a greater number of legal voters remonstrate against the relocation than petition for it, no elec-

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tion shall be ordered." The two sections are harmonious, and when considered together provide that the election shall not be ordered unless the voters petitioning for the relocation of the county seat exceed those who sign the remonstrance thereto. But in no case shall the vote be ordered unless the petitioners equal one-half of the legal voters, as shown by the last census. If, at the time of the action of the supervisors, the voters exceed the number at the last census, so that a minority of all the voters, signing both the petition and remonstrance, are equal to one-half of the voters enumerated in the census, and such minority petition for the election, it cannot be ordered, for the reason that section 283 provides that no election shall be ordered "if a greater number of legal voters remonstrate against the election than petition for it."

The foregoing discussion disposes of all questions presented in appellants' assignment of errors and argument. We think the decision of the Circuit Court is correct.

AFFIRMED.

SEEVERS, J., having been of counsel in this case, took no part in its decision.

45	404
97	698
45	404
117	698
45	404
6119	744
45	404
137	52

PARSONS v. NUTTING ET AL.

1. **Judgment: EQUITABLE JURISDICTION.** A court of equity will not interfere to restrain the collection of a judgment rendered upon a claim admitted to be due, on the ground that it was rendered without jurisdiction of the defendant and that the costs incurred were oppressive.

Appeal from Decatur Circuit Court.

WEDNESDAY, MARCH 21.

THE petition states that in August, 1874, the defendant recovered judgment against the plaintiff for \$166, and that said judgment is void for want of jurisdiction; that no notice of the pendency of the action was ever served on plaintiff, nor was there an authorized appearance in said action for him; that E.

Parsons v. Nutting.

W. Curry, the attorney who claims to have appeared in said action for plaintiff, is insolvent and was so at the time of his appearance; and that said judgment was obtained by fraud and collusion of the attorney for defendant and said E. W. Curry; that said judgment is oppressive for the reason that the amount of seventy-five dollars of costs have been made thereon which were wholly unnecessary.

The amount of the indebtedness from plaintiff to defendant on which said judgment was rendered, and that plaintiff has no defense thereto, was admitted; that execution has been issued on the judgment and levied on plaintiff's real estate, and that he had no knowledge of any proceedings against him until May 1, 1875.

The relief asked is that defendant be enjoined from selling said lands or collecting said judgment, and for all other proper relief. To this petition there was a demurrer, which being sustained the plaintiff appeals.

W. H. Robb, for appellant.

C. C. McIntire, for appellees.

SEEVERS, J.—As the indebtedness upon which the judgment was rendered is admitted and no tender or offer to pay such amount is averred, the question is presented whether the relief asked should, in a court of equity, be granted. It is claimed the judgment is oppressive in so far as the unnecessary costs are concerned. The petition, however, seeks to enjoin the collection of the whole judgment, and counsel for the plaintiff, in his argument, insists that he is entitled to such relief, and does not, even by the way of suggestion, concede that he is entitled to or will accept less.

It would seem that the rule that he who asks equity must do equity applies fully here. The judgment, it may be conceded, was improperly entered, and that plaintiff was not bound thereby; but, inasmuch as he concedes that he is indebted to the defendant and asks a court of equity to enjoin the collection of the judgment, we think he should at least tender or offer to pay what he thus admits is justly due before he can

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obtain the aid of a court of equity. *Piggott v. Addicks*, 3 G. Greene, 427; *Crawford & Kimball v. White*, 17 Iowa, 560; *Taggart & Taggart v. Wood*, 20 Iowa, 236.

According to the plaintiff's own showing, that portion of the judgment which he claims to be oppressive could have been readily separated and distinguished from that portion which is admitted, and why the plaintiff did not content himself with seeking to enjoin such oppressive part we are at a loss to conceive. Had he so done, or expressed a willingness to be content with that measure of relief, we are not prepared to say that a tender or offer to pay would have been necessary before such relief could have been granted. In this respect this case is distinguishable from *Bryant v. Williams*, 21 Iowa, 329.

AFFIRMED.

FRITH v. THE CITY OF DUBUQUE AND THE C., D. & M. R. Co.

1. **Railroads: Damages: Evidence.** In an action by an adjacent owner against a railway company for damages for the occupation of a street, whereby access to his property is obstructed and its value depreciated, the deed of right of way by the owner is admissible in evidence.
2. **—: —: Occupation of Street.** The fact that a city has granted a railway a right to lay its track upon one of its streets does not deprive the owner of adjacent property of the right to maintain an action therefor, if he has suffered special injury not common to the general public.
3. **—: —: Measure of.** The plaintiff in such an action is entitled to recover such special damages as he may have suffered from the time the street was obstructed until the commencement of his action.
4. **—: Occupation of Street: Liability of Cities.** The city which has granted the railway company the right to use its street does not thereby become liable for its obstruction to the adjacent owner.

Appeal from Dubuque District Court.

WEDNESDAY, MARCH 21.

THE petition, in substance, sets forth that the plaintiff is the owner of part of a certain mineral lot in the corporate

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limits of the city of Dubuque; that a legally established street passes through said premises running along the bank of the Mississippi river, under the bluff, and said street is the only way by which plaintiff's said premises can be approached; that the city of Dubuque granted to the defendant, the Chicago, Dubuque & Minnesota Railroad Company, the right of way over said street for the purpose of laying its track along and over the same and running its trains thereon, and that under said grant the said railroad company has laid its track along and upon said street and runs its trains thereon, and completely and wholly occupies said street so as to entirely prevent the plaintiff from using or traveling the same excepting on foot, there being on the east side of said street the Mississippi river, and on the west side thereof almost precipitous bluffs, several hundred feet high.

It is further alleged that, at the time of the obstruction of the street as aforesaid, the plaintiff was engaged upon said premises in the manufacture of glue-stock and material, of soap-grease and material, and in preparing bones and horn for various uses and manufacturing purposes, and had long prior thereto been so engaged; that in the manufacture of said various products he used the offal of the slaughter-houses in and about the city of Dubuque, and the carcasses of horses, cattle and hogs, and that the occupation of said street by said railroad has completely excluded and prevented him using said street, and from hauling loads to and from said premises since about the first day of August, 1870; that his manufacturing business has been interfered with by defendant since the spring of 1870, and since about August 1, 1870, almost entirely destroyed, as above shown, and the value of plaintiff's premises have greatly depreciated to his injury in the sum of ten thousand dollars, for which he asks judgment.

The defendants, for answer, admitted that plaintiff was the owner of the premises, as alleged in the petition, and that the street upon which the railroad was constructed was a regular established street; that the railroad company was running its cars over and along the track and along said street; that the channel of the Mississippi river runs on the easterly side

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of said street, and a precipitous bluff on the westerly side; that previous to the time the railroad was constructed plaintiff used said premises in the manufacture of glue-stock, soap-grease and like material, using therefor the carcasses of animals, and denying the other averments of the petition.

The second defense set up in the answer was in substance as follows: That plaintiff, well knowing the topography of the ground and the necessary effect of the construction and operation of the railroad across said premises, and the right of said company to control the entire width of its right of way, and that owing to the narrow strip lying between the channel of the river and the precipitous bluff, it would be necessary for the company to occupy the entire width of the street, did, on the 7th day of December, 1870, for a valuable consideration, sell and convey to the company the right of way over said premises, with the full privilege to said company to survey, lay out, construct, and maintain said road without any further consideration. The deed referred to is in these words:

"Know all men by these presents, That in consideration of one hundred dollars paid me by the Dubuque & Minnesota Railroad Company, and the benefit I expect to derive from the construction of the said road, I, Thomas J. Frith, of Dubuque county, Iowa, hereby grant and convey to said company the right of way for their railroad over the following described lands: North half of mineral lot 310 in the city of Dubuque, with full privilege to said company to survey, lay out, construct and maintain said road without further consideration.

THOMAS J. FRITH."

“December 7, 1870.

Said deed was duly acknowledged.

It seems that a demurrer to the second defense was sustained. There was trial by jury, verdict and judgment for the plaintiff for fifteen hundred dollars, and defendants appeal.

S. P. Adams and Shiras, Van Duzee & Henderson, for appellants.

Beach & Hurd, for appellee.

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ROTHROCK, J.—I. The court gave to the jury the following among other instructions:

“Streets are for public use, by any and all persons that seek to travel thereon, and the appropriation of a street by a railroad company exclusively, and rendering travel thereon impossible or unsafe, gives to any property holder abutting thereon a right to recover damages therefor, unless such individual does not own the fee to the middle of the street, then such person only owns to the line of the street, and cannot recover for any damages similar to the case at bar.”

“The plaintiff and his grantors being the owners of the premises in question, they were by virtue thereof the owners in fee of the street, or in other words, plaintiff by permitting, or the city by establishing the street, gave to the public the easement or right of way over this ground, but the fee or ownership remains in the plaintiff. Hence, the only privilege or right taken from him was the easement the public had in this for the use of an ordinary street, and that now the use of the same for the purpose of a steam railroad is an additional burden, which cannot be imposed thereon without compensation to the proprietor for this new servitude.

While the city has power to grant the right of way in a street, the company avails itself of this privilege at its peril, that is to say, if in laying its track it causes a private injury to him who owns the fee in the adjoining premises it must make good to such owner the damages he has sustained.”

The thought of the foregoing instructions is that the plaintiff's right to recover is based upon his ownership of the fee 1. RAILROADS: in the street in question, and the jury are plainly damages : ev- told that plaintiff is the owner of the fee, and that if the ownership were only to the line of the street no recovery can be had for any damages similar to the case at bar.

The defendants offered in evidence the deed of the right of way over the premises. Objection was made to its introduction, which was sustained, the court ruling that it was not admissible for any purpose. In this we think there was error.

If, as the court instructed the jury, the plaintiff is entitled to recover by reason of his ownership of the fee in the street,

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the deed of right of way should have been admitted in evidence, as it conveyed to the defendant, the railroad company, the right to construct its road upon any part of the premises in question. And further, the exclusion of the deed necessarily excluded all evidence as to the condition of the construction of the road at the time the deed was made. It is alleged in the petition that on and after August 1st, 1870, the street in question was wholly obstructed. The deed was executed Dec. 7, 1870. If the road was constructed in the street when the deed was made, or if it was in course of construction, so that it was evident the right of way would be taken in the street, the conveyance of the right of way, it seems to us, would have an important bearing upon the plaintiff's right to recover based upon his ownership of the fee in the street.

Another important consideration is that it is not alleged in the petition that the plaintiff is the owner of the fee in the street. The theory of the instructions is that to recover plaintiff must be the owner of the fee, and that the road was improperly constructed, so as to prevent travel on the street to plaintiff's damage. But as there was no allegation of ownership in the street, it was improper to submit the case to the jury upon that theory.

II. The petition does not allege that the railroad company improperly constructed its road so as to prevent travel upon ^{2. — : —;} the street; unless it may be that the allegation ^{occupation of} street. that the whole of the street was occupied with the railroad to the exclusion of the public, may be held to be sufficient to present that issue. We are inclined to think, in the absence of a motion for more specific statement, that the petition is sufficient for that purpose.

It is insisted in the argument for appellants that as the railroad company had the right to occupy the street, with the permission of the city, no action will lie by private persons for such occupation. We are not prepared to assent to this proposition to its full extent. While it is true we have uniformly held, where the fee of the streets is not owned by the adjoining proprietors, that a railroad company has the

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right to take and use streets for the purpose of building and operating railroads, yet it does not follow that in so doing the road may not be so negligently built, or the street so occupied as to create a nuisance. And in such case, any one who suffers special damages not common to the whole public may recover. See *Cadle v. Muscatine Western R. Co.*, 44 Iowa, 11, and *Park v. C. & S. W. R. Co.*, 44 Iowa, 636.

To entitle a party to recover such special damages we do not think it necessary that he should own the fee in the street, but as the case at bar was not submitted to the jury upon this theory, it is unnecessary to pursue the thought further.

III. The court gave the jury the following instruction: "The test or method of arriving at such damages is to determine the marketable value of such property before plaintiff was deprived of his street or access to his property, and what is now the marketable value of such property deprived of such street or access thereto, and the difference between these amounts should be your verdict."

This action is not a proceeding under the right of way act, and the judgment upon these pleadings does not determine the right of the defendant to use and occupy the street in question, to the exclusion of the plaintiff and all others for all time to come. If such were the effect of the judgment the measure of damages provided in the above instruction would be correct. But the railroad company to avoid the payment of damages and costs may cut into the bank, or otherwise widen the street so as to allow a passage way for travel, and thus avoid further liability. Conceding plaintiff's petition to be true, plaintiff is entitled to such special damages as he may have sustained from the time the street was obstructed by the railroad company down to the commencement of this suit.

IV. The defendants both joined in the same defense, and no separate defense was made for the city of Dubuque in the court below. It is now insisted that whatever liability there may be against the railroad company defendant, there can be no recovery against the city.

As the cause must be reversed for the errors above discussed,

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it is not necessary to determine the effect of a failure of the city to make a separate defense in the court below. We do not believe the city is liable. It may by ordinance permit the use of a street for a railway. The railway company accepts the grant subject to liability for any damages which may be sustained by individuals, by an improper construction of the road, or unauthorized use of the street. The use of the street under such permission or grant cannot make the city liable in damages.

REVERSED.

45 412
94 710

45 412
108 76

45 412
6123 129
6123 136

45 412
126 502

THE STATE v. JAMES.

1. Criminal Law: ATTEMPT TO ESCAPE: INSTRUCTION. Whether or not one charged with an offense made an attempt to escape after its commission is a question for the jury, and where there is evidence tending to show that the attempt was made an instruction respecting its legal effect is proper.

Appeal from Warren District Court.

WEDNESDAY, MARCH 21.

THE defendant was indicted, tried and convicted, for an assault with intent to murder, and he appeals.

McHenry & Bowen and W. H. Schooley, for appellant.

M. E. Cutts, Attorney General, for the State.

ROTHROCK, J.—I. The evidence tends to show that a dispute arose between the defendant and one Colclazier, about the payment of a small sum of money. They were both in the village of Summerset. The defendant followed Colclazier about the village, and when the latter started to leave in his wagon the defendant threw his overcoat, valise, and a medicine box into the wagon, and attempted to get in. Colclazier started his team, forbid the defendant from getting into the wagon, and was about to strike him with

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a board. The defendant let go his hold upon the wagon and shot at Colclazier with a revolver. A number of persons witnessed the whole transaction. After the shooting the defendant returned to where some of the witnesses were and asked one of them for the use of his horse, but did not say for what purpose. Not getting the horse, the defendant immediately started to leave the place, in the same direction which Colclazier went. There is not entire harmony in the testimony of the witnesses as to how fast the defendant traveled. One witness states, "the defendant went faster than a walk, but did not seem to be running his best; he was out of a walk; you might say a run." He was followed by several persons, and upon being ordered to halt he surrendered himself.

The court instructed the jury *inter alia* as follows: "2. If you find from the evidence that the defendant, immediately after the commission of the act complained of (if he committed it), fled, or attempted to escape, or avoid arrest, or evade justice, such fact is a circumstance which *prima facie* is indicative of guilt." It is insisted that this instruction is erroneous because there is no evidence tending to show that the defendant attempted to escape. We think otherwise. It is true, as it appears to us, the evidence of an attempt to escape is slight, but it was a question for the jury to determine from all the circumstances, including the attempt to borrow a horse, and the haste with which defendant was leaving the place of his encounter with Colclazier.

II. The principal part of the argument of counsel is in support of the proposition that the verdict is contrary to the evidence, because it is shown conclusively by the evidence that the defendant, when he fired the revolver, was too far distant from Colclazier to injure him. There is a conflict in the evidence upon this question. The witnesses who saw the transaction estimated the distance between the parties, when the shot was fired, and as is usually the case there is a difference between them. Certain measurements were taken, which it is insisted show conclusively that the distance was so great that there could have been no felonious intent in firing the revolver. But, after all, the witnesses might have been mistaken as to

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the position of the parties with reference to the objects from which the measurements were made.

The jury might well have found, under the evidence, that the parties were not more than twenty-five or thirty yards from each other when the shot was fired; and tests afterward with the revolver show that it might produce fatal results at a distance even greater than thirty yards.

III. Other exceptions were taken which are presented for consideration. They consist principally in the refusal of the court to give certain instructions asked by the defendant. We have examined them in connection with the instructions given by the court on its own motion, and find no error in the refusal to give those asked. The instructions given by the court contain a clear and concise statement of the law as applicable to the facts of the case. Those asked by the defendant are either fairly included in those given, or are inapplicable to the evidence in the case. We need not particularize. The judgment of the court below will be

AFFIRMED.

THE STATE v. THOMPSON.

1. **Practice: INSTRUCTIONS: APPLICABILITY TO EVIDENCE.** The giving of instructions which contain correct propositions of law but which are not applicable to the evidence, and the failure to instruct the jury how to apply the evidence given in the case, constitute error justifying a reversal.

Appeal from Hardin District Court.

THURSDAY, MARCH 22.

INDICTMENT for larceny. Trial by jury, verdict of guilty and judgment, from which defendant appeals.

Porter & Moir, for appellant.

M. E. Cutts, Attorney General, for the State.

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SEEVERS, J.—There was no evidence tending to show that the stolen property was found in defendant's possession at any time after the larceny. Such being true, the court ^{1. PRACTICE: instructions: applicability to evidence.} instructed the jury: "Where property recently stolen is found in the possession of any person, the burden of proof is upon such person to show how he came into possession of said property, and unless such person shows that he came honestly into possession thereof the law will presume he stole the same."

As an abstract proposition of law the instruction was no doubt correct, but as applied to the facts or evidence it was erroneous. *The State v. Arthur*, 23 Iowa, 430; *Byington v. McCadden*, 34 Iowa, 216.

In all the cases to which our attention has been called, in which it has been held to be prejudicial error to give an instruction not based on the evidence, the jury were told if they found so and so, or if the evidence proved a certain state of facts, then the law as applied thereto was as stated. This is not the case with the instruction in the case at bar, and no other rule or guide was given the jury than is contained in the instruction itself. In one sense, it should have had no more effect on the jury than any other proposition of law wholly inapplicable to the case before them. We should, therefore, incline to hold that such instruction could not constitute prejudicial error, were it not for the fact that all the instructions given are of the same character; that is to say, they are all simple, and, as we think, correct, propositions of law, but they fail, like the one under consideration, on their face to show their applicability to the case, or evidence before the jury. The jury, therefore, were left without any other guide than correct propositions of law, it may be said, and to such they were left to apply the evidence without any intelligent aid from the court. Under these circumstances we are unwilling to say the giving of the foregoing instruction may not have been prejudicial error.

We discover no other error in the instructions, nor can we say, in the state of the record, there was any error in the admission of evidence, or that the failure of the court to sus-

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tain defendant's objection to the course of argument adopted by the district attorney was prejudicial error. We confess our inability to see any justification for the line of argument adopted by the attorney for the State, and as it appears from the record before us we think the court should, when requested, have interfered; but this was a matter which, to a large extent, was within the sound discretion of the trial court, and unless error caused thereby could be affirmatively shown we should not feel warranted in interfering with the action of such court.

REVERSED.

45 416
d95 11
45 416
106 96
45 416
f108 634
45 416
111 582
45 416
119 586
45 416
123 96
45 416
125 53
45 416
f143 329

FRY v. THE DUBUQUE & SOUTHWESTERN RAILWAY COMPANY.

1. **Damages: FUTURE PHYSICAL SUFFERING.** While future physical suffering is a proper element of damages, yet the damages should be limited to such as would result with reasonable certainty from the injury complained of and should not be left to mere conjecture.

Appeal from Jones District Court.

WEDNESDAY, MARCH 21.

It is claimed by the plaintiff that the defendant permitted snow and ice to accumulate on the steps and platform at its station house in Monticello, whereby the same became dangerous, and that plaintiff slipped and fell therefrom, whereby she was greatly injured. There was a jury trial. Verdict and judgment for the plaintiff. Defendant appeals.

Clark & Moulton and N. M. Hubbard, for appellant.

J. Q. Wing and E. Keeler, for appellee.

SEEVERS, J.—The evidence satisfies us that the injury received by the plaintiff was not of a permanent character, **1. DAMAGES:** nor was it at all times painful. At the trial the future physical suffering. plaintiff testified: "I still have to bathe my limb in cold water sometimes and wrap it up after walking, it gets

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painful." The limb had been previously injured, and the attending physician testified: "I think her limb was in a fair way to recover permanently after the first injury, and I would not say there is no chance for a permanent recovery now, and I think the probabilities are in favor of a recovery now." Such being the evidence as to the character of the injury and the probabilities as to future suffering, the court gave the jury the following instruction:

"9. If you find from the evidence, as hereinbefore stated, the plaintiff is entitled to recover, then you will take into consideration the nature and character of the wound or injury, the present situation and condition of her limb, the pain she has suffered, or which from the evidence she will suffer, and you will give her such damages as will fairly compensate her for all past, present or future physical suffering or anguish which is, has been or may be caused by said injury."

If the injury is of a permanent character, it is conceded there may be a recovery for future physical suffering, and such was the ruling of this court in *Collins v. Council Bluffs*, 32 Iowa, 324. But it is claimed such is not the rule if the injury is not of that character. We, however, think otherwise, and hold that if the injury is not of a permanent character, but the reasonable certainty is, as shown by the evidence, there will be future pain and suffering there may be a recovery therefor. There was evidence tending to show there might be such suffering, sufficient to authorize the court to submit such question to the jury. We, however, are of the opinion the instruction is too broad, and throws open the door so wide that the jury could well enter the domain of conjecture and indulge in speculation to a greater extent than is allowable. The jury were authorized to not only give damages for future pain and suffering, but also for such as *may* be caused by said injury. They should have been directed that they might give the plaintiff damages for such future pain as it was reasonably certain from the evidence she would suffer. They should have been clearly and positively instructed that they could look alone to the evidence and therefrom determine as to the future suffering. They had no right to allow damages for

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mere possibilities, and such under the instruction they could without doubt have allowed.

In view of a re-trial we deem it proper to say that we discover no other error, unless it be in the admission of the evidence of Henry Austin, and whether such evidence was admissible we are not agreed, and this must be regarded as an open question. The doubt is whether it was proper to permit Austin to testify as to the condition of the steps during the whole month of February, instead of confining the evidence to about the time the plaintiff was injured.

REVERSED.

45	418
80	84
45	418
81	302
45	418
84	82
45	418
89	121
45	418
91	570
45	418
97	444
98	704
100	508
45	418
111	76

THE STATE v. BOWMAN.

1. **Seduction: PREVIOUS CHARACTER.** In a prosecution for seduction the previously chaste character of the prosecutrix is presumed, but such presumption may be rebutted by proven or admitted facts, or the circumstances of the case.
2. **New Trial: CONDUCT OF JURY: PRACTICE.** That one of the jurors left the room where the jury were considering the case for a proper purpose, in the care of the deputy sheriff with whom he had no conversation about the case, did not justify the granting of a new trial.
3. **—: NEWLY DISCOVERED EVIDENCE.** A new trial should not be granted on the ground of newly discovered evidence, unless the application be accompanied by a showing of diligence to procure it upon the trial and unless, also, it appear to the satisfaction of the court that a different result might probably be expected if the application is granted and the case tried again.
4. **—: —: CRIMINAL LAW.** The statutes of this State do not authorize the granting of a new trial in a criminal case on the ground of newly discovered evidence.

Appeal from Poweshiek District Court.

WEDNESDAY, MARCH 21.

INDICTMENT for seduction. There was trial, verdict of guilty, and a motion for a new trial filed when the verdict was rendered. The motion was overruled and judgment pronounced

The State v. Bowman.

sentencing the defendant to the penitentiary. From the action of the court in the premises the defendant appealed.

At the subsequent term of the District Court the defendant presented a petition for a new trial, based on newly discovered evidence, which evidence had been discovered and come to the knowledge of defendant since the trial and judgment. The court refused to entertain such petition, and refused to grant a new trial thereon, and to such ruling the defendant excepted and appealed to this court. These two cases are docketed separately but they will be both considered and disposed of in one opinion. The bill of exceptions in the second case shows that at the time it came on for hearing the appeal in the first case had been taken to this court.

Ballard & McCready, for appellant.

M. E. Cutts, Attorney General, for the State.

SEEVERS, J.—I. In the third instruction the court said to the jury that the previously chaste character of the prosecutrix was presumed, but that such presumption could be rebutted by proven or admitted facts or the circumstances in the case.

This instruction is correct. *State v. Higdon*, 32 Iowa, 262.

II. It is assigned as error that the jury disregarded the instructions and found the defendant guilty on the unsupported testimony of the prosecutrix. A careful reading of the testimony by each member of the court satisfies us all, without doubt or hesitation, that the prosecutrix was abundantly corroborated. It would serve no good purpose to point out or occupy time and space in stating our reasons for what so clearly appears in the record.

III. Taken all together, the affidavits show that one of the jurors was permitted to leave the jury room for a necessary and proper purpose; that he was accompanied by the deputy sheriff, and that such juror had no conversation while absent with any one except the deputy sheriff, and with him only to the extent of asking permission to retire. The fact that the bailiff who had charge of

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the jury when said juror asked leave to retire was temporarily absent, and he was let out of the room and returned thereto by the deputy sheriff, can make no difference. It affirmatively appears that no possible prejudice resulted from said juror's having left the room and returning thereto, and therefore a new trial should not have been granted for this reason.

IV. It is not specially urged by counsel that the verdict is against the evidence, still we understand them to so claim. Here, again, a careful reading of the evidence satisfies us that the verdict is sufficiently sustained by the evidence. If the evidence given by the prosecutrix was believed there cannot be a particle of doubt on this subject. That the jury and the court below so believed is apparent. Otherwise, the verdict should have been for the defendant, or a new trial granted. There is nothing on the face of the evidence of the prosecutrix to warrant us in concluding otherwise under the settled practice of this court.

V. A new trial was urged below and renewed here on the ground of newly discovered evidence. It occurs to us that ~~s.~~ ^{newly} discovered evidence was cumulative, but it is not entirely clear that all of it is of that character. But there is another reason why a new trial cannot be granted for this cause, and that is no diligence whatever is shown in procuring the testimony previous to the trial, except that of Mrs. Vest, and it is not shown that she knows anything whatever in relation to the guilt or innocence of the defendant. In fact, the attorney for defendant testifies that he does not know what she will testify to, and the affidavit of Mrs. Vest was not procured. It is true it was shown she was absent and her affidavit could not be procured. This certainly was unfortunate, but a new trial cannot be granted unless the court should conclude if the desired evidence was introduced on another trial a different result might probably be expected, and this cannot be determined from the showing made as to Mrs. Vest. As to what is expected to be proved by Kness and Bernard, no showing whatever as to diligence is made. All that appears is, that these witnesses did not inform defendant of the mat-

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ters within their knowledge until the day their affidavits were taken. But this is not sufficient; the defendant must show that he inquired and made efforts to ascertain what these parties and others may have known. He may not have suspected these persons knew anything, but if he had inquired of persons likely to know and made reasonable efforts this identical testimony might have been discovered in time for the trial.

This disposes of all the errors assigned or discussed by counsel, and the judgment of the District Court in the first case must be

AFFIRMED.

THE SECOND CASE.

We regret to say that there is no statute authorizing a new trial in a criminal action on the ground that testimony material ~~4. — : to the defense has been discovered since the trial,~~ criminal law. and which could not with reasonable efforts be discovered previous thereto. Such is the rule in civil actions, and we are unable to see why it should not prevail in criminal causes. But we cannot make law and must determine this cause as well as all others in accordance with the law as we find it to exist. The action of the court below was, therefore, correct.

We cannot forbear remarking that, if the same diligence had been exhibited before the trial in procuring evidence as there was afterward, a different result could reasonably have been expected. The affidavits adduced very strongly tend to show that the prosecutrix was not of previously chaste character, and if we could, under the settled principles of law, consider the affidavits presented, we strongly incline to think we should come to a different conclusion from that to which we have felt ourselves bound to come. We cannot but believe that, if all the evidence contained in the affidavits had been presented to the jury, they would not have found the defendant guilty. But, as has been said, we cannot afford him any relief; his remedy, if any he has, is before another department of the government.

AFFIRMED.

Shoemaker v. Lacy.

SHOEMAKER ET AL. V. LACY.

1. **Tax Sale: REDEMPTION FROM: DOUBLE SALE.** A tract of land cannot be twice sold for taxes at the same sale, notwithstanding the taxes thereon may be delinquent for two different years, and the second sale being invalid the purchaser is not entitled to a deed, and redemption therefrom is unnecessary.

Appeal from Warren District Court.

WEDNESDAY, MARCH 21.

ACTION to set aside a tax deed. This cause was first tried in the District Court in 1872, and the plaintiff's petition was dismissed. On appeal to this court the judgment of the District Court was reversed and the case remanded. On motion in the District Court a decree was rendered setting aside the deed as prayed in the petition. From the decree the defendant appeals.

Prior to the rendition of the decree a motion had been made in this court by defendant to tax the costs of this court to plaintiffs. The appeal and motion have been argued and submitted together.

Bryan & Seavers, for appellant.

Williamson & Parrott, for appellees.

ADAMS, J.—I. The plaintiffs are the owners of certain land in the county of Warren. The defendant obtained a tax deed of said land. This action was brought to set aside the deed on the ground that prior to its execution the plaintiffs redeemed the land from the tax sale. The defendant denied that the land had been redeemed, and upon this issue the parties proceeded to trial. It appeared in evidence that on the 13th day of Oct., 1864, the land was sold to defendant at tax sale for the tax of 1863, and a certificate, No. 214, was issued in pursuance thereof. Afterward, but on the same day, the land was sold again at tax sale for a different

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amount, but whether the sale was for the tax of 1863 or 1860 does not distinctly appear. A certificate was issued, numbered 215. Before the expiration of the three years the plaintiffs applied to redeem, and paid the sum necessary to redeem from the sale, as shown in certificate No. 214.

They did not attempt to redeem from the other sale, supposing that there was no other sale, and that they had made a complete redemption. After the expiration of three years the defendant obtained a tax deed upon certificate No. 215; that is the deed which this suit was instituted to set aside. The District Court held that the land had not been redeemed, as plaintiffs averred in their petition, and dismissed their petition. This court reversed the judgment.

MILLER, J., said: "We are convinced from all the evidence that the effort to make full redemption was made in good faith, but was defeated by the unauthorized conduct of the treasurer. Equity and good conscience require that the plaintiffs should now be permitted to redeem by paying the amount for which the lands were sold on the other sale, as shown in tax sale certificate No. 215."

The plaintiffs, without paying or tendering the amount called for by said certificate, moved for a decree in accordance with the prayer of their petition, and the District Court granted it, and the defendant's deed was declared null and void. The appellant contends that this court at most granted only the right to redeem, which right the plaintiffs never exercised; that the land was therefore not in fact redeemed, and that the District Court erred in setting aside the deed. From the quotation made above from the opinion it will be seen that the appellant's position is plausible.

We are constrained to think, however, that it cannot be maintained. What this court did under the issue and undisputed facts is the essential thing. It reversed the decision of the court below; this could not have been done on the ground that the plaintiffs had attempted to redeem and failed through a mistake, and without fault on their part, and were therefore entitled to relief. No such issue was tendered. The plaintiffs averred that they had redeemed, and defendant denied it; this

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was the issue; no other was presented. The District Court found that the plaintiffs had not redeemed. This court reversed the decision. Now the reverse of that decision certainly is that the plaintiffs had redeemed. And such indeed appears to have been the fact. They had redeemed from the sale as shown in certificate No. 214, and that was really the only sale; the other sale was made without authority of law and was void. Section 763 of the Revision provided that "the sale shall be made for and in payment of the total amount of taxes, interest and costs due and unpaid." The sale then made as shown in certificate No. 214 must be regarded as having been made "for and in payment of the total amount of taxes," etc. There was then no tax for which the land could be sold again at that time. This was held substantially in *Preston v. Van Gorder*, 31 Iowa, 250, and MILLER, J., in his opinion in the case at bar cites approvingly that case, and holds that the second sale was unauthorized. But it is plain to see that it was unauthorized because the first sale was made "in payment of the total amount of taxes" on the property. It was not, therefore, a sale from which a redemption was necessary.

In *Noble v. Bullis*, 23 Iowa, 559, there had been two sales as in this case. The plaintiff redeemed from the second and not the first. It was held that the redemption was not good, but that the plaintiff might under the circumstances redeem, notwithstanding the three years had expired.

That case it will be seen differs from this in a material point. The redemption in that case was made not from the valid but the invalid sale. It is not applicable, therefore, to this case as showing that the plaintiffs have still to redeem.

We think, then, that this court might have gone farther than it did in the case at bar, and dispensed with a redemption altogether. Indeed the effect of the decision was to dispense with a redemption. Such being our view it follows that the decree of the District Court is correct.

II. What we have already said will indicate our view on the question of taxation of costs. The District Court, while rendering a decree setting aside the defendant's deed, rendered

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judgment in defendant's favor for the amount necessary to redeem.

The defendant contends, therefore, that if this court held that he was entitled to judgment for the amount necessary to redeem, or entitled to the land unless redeemed, in either case he should recover the costs in this court. But, as we have seen, the reversal of the case upon the issue made was necessarily a decision that the land had been redeemed as plaintiffs averred. What was said about plaintiffs being still permitted to redeem was unnecessary. Upon that point the decision was more favorable to the defendant than he was entitled to, and he should not take advantage of the fact upon a question of costs.

AFFIRMED.

THE STATE v. OSBOURNE.

1. **Criminal Law: LARCENY: IDENTITY OF PROPERTY.** To sustain a conviction for larceny based upon the possession of the stolen property by the defendant, the identity of the property should be satisfactorily established.
2. **Instructions: PERTINENCY TO EVIDENCE.** Instructions should be based upon the evidence, and pertinent thereto.

Appeal from Greene District Court.

WEDNESDAY, MARCH 21.

At the November Term, 1874, of the Greene District Court the defendant was indicted for the larceny of a double set of harness, the property of Joshua Payne, on the night of the 27th day of April, 1874, from the stable of said Payne, in Greene county. The defendant pleaded not guilty, and upon his motion the cause was continued. At the April Term, 1875, the cause was tried, and the jury disagreed. At the November Term, 1875, the cause was again tried; a verdict of guilty was returned, and the value of the property was assessed at \$21. The motion for new trial was overruled, and

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the defendant was sentenced to the penitentiary for one year. The defendant appeals.

Jackson & Head, for appellant.

M. E. Cutts, Attorney General, for the State.

DAY, CH. J.—We are satisfied that the evidence is utterly insufficient to support the verdict, and that for that reason a new trial should have been granted. Payne's harness was stolen on the night of the 27th of April, 1874. On the 22d day of July, 1874, the defendant was arrested in Wilson county, Kansas, and had in his possession a set of harness which Payne claims are the ones stolen from him.

1. The harness found in defendant's possession were produced at the trial. Their identity with those stolen from Payne is not satisfactorily established. It is true ^{1. CRIMINAL law: larceny: identity of property.} Payne testifies generally that the harness are his, and he undertakes to point out particular rings and buckles which he swears are his. But upon further examination he states that "when the harness were stolen there were three cockeyes sewed in, and one riveted in. When I next saw them at preliminary examination there was a change; they answered my harness in every particular except the cockeyes were all solid, none riveted in. These bits are not mine; they are not the same bits that were in them when stolen; there are other parts of the harness that don't answer the description of the ones I had stolen. This pole strap is not mine, and never was; there are rivets in them, mine had none; the other I think is mine, but the rivet has been put in since they were stolen. This buckle was not broken when they were taken away. I judge these belly bands are not mine; this one looks more natural than the other; they look as though made by the same person; I believe they have been changed since the last term of court; they have been changed since I last saw them; I don't believe I ever saw them before; I am positive they are not mates. The belly bands on my harness are mates. When my harness was taken away neither one of the belly bands was scarred or chewed." The proof is

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positive that no change had been made in the harness since the last term of court, and that one of the belly bands is badly chewed. It appears, then, by the admissions of Payne that the harness stolen from him differ in five respects from those found in defendant's possession; the bits are not the same; the pole straps are not the same; the belly bands are not the same; one of the cockeyes is not the same, and there is a broken buckle which was sound. This certainly is not very satisfactory evidence of identity.

2. The defendant's family resides in Wilson county, Kansas. For four months prior to the date of the alleged larceny defendant had lived with his brother-in-law, J. T. Bentley, about one-half mile from Payne's. On the evening of the 27th of April, the defendant was at Bentley's house about sun down. After supper he and Bentley went to Corbin's, a distance of one-fourth of a mile. They left there about ten o'clock and returned to Bentley's, where they remained about two hours. Bentley helped defendant carry his trunk thence to the depot, a distance of two miles, where they arrived about one o'clock in the morning. At 3:44 A. M. defendant went west to Council Bluffs, on his way home to Kansas. The trunk was packed at Bentley's house, and no harness were in it. The night operator saw defendant get on the train, but saw no harness in his possession. The defendant's wife testifies that he arrived at home near Fredonia, in Kansas, 16 or 18 miles from the railroad, about the last day of April, afoot, and brought no baggage with him. His trunk came in about a week; there were no harness in it.

3. Charles Sweeney, an attorney at law of Fredonia, and Stewart Osborne, a son of defendant, testify that they saw defendant buy a set of harness at an auction sale at Chaunte, Kansas, 28 miles from Fredonia, in May, 1874, and pay \$18.35 therefor. Sweeney, at Osborne's request, examined the harness, and told him what he thought of them, before they were bought. Both these witnesses fully and satisfactorily identify the harness bought at Chaunte as the same produced upon the trial, and claimed by Payne. In addition to all this it is proved that the defendant's character is good, and that

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his dealings have always been honest. There is absolutely no proof that defendant committed the offense charged, aside from the supposed identity of the property found in his possession with that stolen. It seems marvelous that the jury should have found the defendant guilty under the proof adduced.

II. The court gave the jury the following instruction:

"6. But if you should be satisfied by all the circumstances surrounding the case that the sale of the harness at auction, if such sale actually took place, was a mere subterfuge resorted to by the defendant for the purpose of giving an appearance of honesty to his possession of the harness, while in fact he had placed them in the hands of the auctioneer to be sold, his purchase at such sale would not rebut or overcome the presumption of guilt which arises from his possession of the property after the larceny. But you ought not to conclude that his purchase at the auction, if he made such purchase, was not a *bona fide* transaction except upon satisfactory proof; a mere suspicion that such is the case would not be sufficient."

The former part of this instruction ought not to have been given, for there is not a scintilla of evidence that the auction sale was a subterfuge to keep up appearances of honesty. If it should be held that the latter part of the instruction cures the error in the former part, then the verdict should have been set aside as not supported by the evidence, for there is no conflict in the evidence that the auction sale occurred, and under the evidence submitted there can be nothing more than a mere suspicion that it was not *bona fide*.

REVERSED.

Chamberlain v. Collinson.

CHAMBERLAIN V. COLLINSON ET AL.

1. **Principal and Agent: LEASE: RATIFICATION OF.** Where one who was in the employ of a mining company in a subordinate capacity leased the right to mine in a certain range to a party who paid rent therefor to the company, and the company received the same without objection, its conduct was held to amount to a ratification of the unauthorized act of its agent.
2. **— : JUDICIAL SALE: MINES AND MINING.** Where the leased property was sold on execution, pending the lease, the execution purchaser was charged with constructive notice of the lessee's possession unless the latter had ceased to work the premises in a miner-like way.
3. **— : — : — .** An application by the lessee to the purchaser, after threats by the latter that he would be disturbed in his possession, for permission to work a part of the range covered by his lease, will not deprive the lessee of the right to work all of the range embraced in his original contract with the lessor.
4. **— : — : MEASURE OF DAMAGES.** The execution purchaser having mined a part of the range embraced in the lease, the lessor is entitled to recover from him the value of the mineral he has taken out, with interest thereon from the time when the mineral was mined and sold, diminished by the amount of the rent due under the lease and the reasonable cost of mining.

Appeal from Dubuque District Court.

THURSDAY, MARCH 22.

THE plaintiff avers in his petition, in substance, that he is the owner of the mining right on what is known as the Level Range through mineral lot 268, in Julien township, Dubuque county, Iowa, and has the exclusive right to work on said range, and dig and take away mineral from the same; that the defendants never had any right to work on said range, except along and in the cap rock; and the said right to work in the cap rock they abandoned, and for more than six months ceased all work and labor therein, whereby their right to take mineral out of said cap rock was forfeited; that the defendants have wrongfully taken possession of the whole of said range, and are about to proceed to work it below the cap rock; that said defendants are insolvent, and that the plaintiff will

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suffer irreparable damage by the acts of the defendants unless they are restrained. The petition prays for an injunction.

The defendants aver that they have the exclusive right to mine in said range; that they have been lessees of such right for more than four years prior to the commencement of the suit; that they worked the same continuously until interrupted by the plaintiff, and expended in labor and materials about \$9,000; that after they had discovered large quantities of mineral the plaintiff took possession of the range and took out said mineral. The defendants, by way of cross-petition, ask judgment for the value of the same. Decree for plaintiff. Defendants appeal.

Pollock & Shields, for appellants.

H. B. Fouke, for appellee.

ADAMS, J.—The defendants claim by lease from the Dubuque Level and Lead Mining Company. The plaintiff claims by purchase at an execution sale under a judgment against said company. The defendants claim the right to mine from what is called the grave yard shaft to the Carter pond shaft, a distance of about 1400 feet.

The plaintiff denies such right, and claims that at most they acquired the right to mine only from the said grave yard shaft to the gin shaft, a distance of about 500 feet.

The first question to be determined is: Did the defendants acquire any right from said company, and if so, what was the extent of the same?

Whatever rights were acquired, if any, were acquired through one H. W. Clark, who, previous to the time of the alleged leasing, if not at the time, was foreman and agent of said company in running a water level. He also, in many respects, seems to have been the superintending agent of the company, but the evidence fails to satisfy us that he was authorized to grant the right to mine said range.

That he undertook to grant such right is clearly proven. The defendant Collinson says: "Charles Stevenson and Clark

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leased and let me have the Level range exclusively from the Carter pond shaft to the grave yard shaft." In this he is substantially corroborated by said Stevenson, who at the time of the transaction was in the employment of the Level Company with Clark. He says: "Clark and I went over to the grave yard shaft and found Collinson there. Clark let Collinson and his associates the privilege of going into the grave yard shaft and working out the mineral from there to what is known as the Carter pond shaft. * * * * The ground let was the Level range from the grave yard shaft west to the Carter pond shaft. Collinson was to work the whole distance there, anywhere on that ground; no restriction as to place. * * * * I consulted with Clark about that, but had nothing to say about it at the shaft; I let Clark do the talking."

It seems to be equally well established that under the said leasing Collinson and his associates entered immediately upon and worked the said range, and struck mineral and paid rent to the company, and no objection was made by the company, so far as the record shows. We must hold, therefore, that Clark's acts, in leasing to the defendants the right to mine in the range, were ratified by the company, and that defendants' right extended from the grave yard shaft to the Carter pond shaft, and included the right to mine in the bottom of the drift as well as in the cap rock.

About two years after the defendants commenced mining the interest of the said company in the premises was sold on ^{2. ——— : ju-} execution sale to the plaintiff, who had no actual ^{dicial sale:} notice of defendants' claim. Whether the defendants had such possession of the premises at that time as was sufficient to impart constructive notice of their claim depends upon whether they had ceased to work the premises in a miner-like way.

On this point the evidence is somewhat conflicting. Collinson says: "I worked that range from the time I got it in the spring of 1868 to the spring of 1873 constantly and continuously whenever my part of the range could be worked, first with Hurd and John and William Luke, and after Hurd

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quit myself and my four boys kept on; when the water got up in the crevice so we could not work, we would sometimes work elsewhere." In this he is corroborated by William Luke, who testified that they always kept possession of the diggings, and that their picks, shovels, bars, tubs, ropes and windlasses were kept there. John Luke testified that they worked on the range all the time when not prevented by water until the spring of 1873, and had two windlasses all the time at the diggings. This testimony is not to our mind overcome. Such possession would constitute constructive notice, and the rights of the miners would be protected under it. The same evidence shows that the defendants did not abandon the premises at any time.

It appears, however, that after the sale to the plaintiff the defendants obtained permission of the plaintiff's agent to work ~~s. —: —:~~ in the cap rock. It is claimed that this fact, if not ~~s. —: —:~~ of itself an abandonment of their right to work in the bottom of the drift, should be regarded as an admission that they had no right to work there. The acts and words of the defendants in this respect must be viewed in relation to the circumstances in which they were situated. After the plaintiff bought, one Baxter told the defendant Collinson that he had orders to stop him, and that he must take his tools out, and denied that Clark had any authority in the matter. The evidence tends to show that the defendants were disturbed by the attempts which were made to stop their work, and while so disturbed they obtained leave from the plaintiff to work in the cap rock. But if they already had the right, as we hold, to work both in the cap rock and bottom of the drift, that right, we think, was not affected by obtaining plaintiff's consent to work in the cap rock; the occasion of their doing so being that he was threatening to stop their whole work.

The evidence shows that the plaintiff took out 77,880 pounds of mineral, worth \$40 per thousand, and 2,220 pounds worth ~~4. —: —:~~ ^{measure of damages.} \$42 per thousand, amounting to \$3,248.40. From this should be deducted fifty per cent for rent, the amount which defendants were paying; also, such other sum as would have been to the defendants the reasonable cost of

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raising the same. The defendants should have judgment for the balance. Upon the question of cost of raising the mineral there is no satisfactory evidence, and the case must be remanded for the purpose of taking testimony in relation to it.

REVERSED.

ON REHEARING.

The defendants claim that this court erred in not allowing interest upon the money due them from the plaintiff; and, also, in not allowing them the full value of the mineral when raised, less rents.

As to interest, there is nothing said in the opinion, nor was our attention called to it by counsel in the first presentation of the case; but the defendants are entitled to recover as damages the amount set forth in the opinion, and in addition an amount equivalent to interest thereon, to be computed from the time the damages accrued. This was not, we think, when the plaintiff took possession, but when the mineral, which the defendants had a right to mine, was mined and sold by the plaintiff. If the evidence is insufficient, as it appears to us to be, to show fully the different dates from which computations should be made, further testimony should be taken in relation thereto.

Upon the question as to whether there should be deducted from the value of the mineral, when raised, the reasonable cost of raising it, we see no reason to change the views which we have already expressed. There are, to be sure, cases in which it has been held that a trespasser cannot be allowed compensation for enhancing the value of the property which is the subject of the trespass. In *Stewart v. Phelps*, 39 Iowa, 18, the defendant had wrongfully levied upon a crop of corn, and caused it to be husked and cribbed, whereby he enhanced its value, and he claimed that he should be allowed for such enhanced value. DAY, J., said, however, in delivering the opinion of the court: "If the levy was not authorized, and amounted to a wrongful conversion, the defendant became a trespasser, and he is not entitled to compensation for husking

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and cribbing, notwithstanding those acts may have increased the value of the property," citing *Baker v. Wheeler & Martin*, 8 Wend., 505, and *Silsbury et al. v. McCoon et al.*, 3 Com., 579.

But in the case at bar the mineral raised by the plaintiff was taken from his own ground. He is not seeking an allowance for value added by him to the defendants' property. The defendants are seeking to recover, not the mineral, but damages. Now, the damages which they have sustained arose from the fact of their being deprived of the full benefit of their lease. They have been prevented from mining mineral which they had a right to mine. The question then is, what is the value of the right of which they have been deprived? It is, evidently, the value of the mineral unmined, or what is the same thing, the value of it mined less the reasonable cost of mining it. It was so held in *Stockbridge Iron Company v. Stove Iron Works*, 102 Mass., 80, and in *Mayo v. Tappan*, 23 Cal., 306. In *Foreyth v. Wells*, 41 Penn. St., 291, it was also held that the measure of damages was the value of the ore in the ground, but the rule was qualified by the condition that the defendant is not guilty of a willful wrong or gross neglect. In the case at bar we think that Chamberlain was not guilty of a willful wrong or gross neglect. Whatever rights the defendants acquired in the range, so far as mining in the bottom of the range was concerned, were acquired from the Dubuque Level and Lead Mining Co., from whom the plaintiff derived title. They had only a verbal lease and the evidence in regard to it was conflicting.

After the rehearing was granted upon the defendants' petition the plaintiff applied for a rehearing. He claims that receipt of rent by the plaintiff should not be regarded as a ratification of the leasing, because it does not appear that the plaintiff received the rent "with full knowledge of the portion of the range from which the mineral was raised."

The ratification, as we hold, took place by reason of the receipt of rent by the company from whom the plaintiff's title was derived. As to whether the company knew from what portion of the range the mineral was raised does not

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appear, nor do we think it material. The evidence shows that the defendants expended a large amount of money and labor in its mining in various parts of the range, and in reaching and uncovering the very mineral in controversy. In expending the labor and money, we think that they were justified in doing so upon the assumption, from the time that the company began to receive rent, that Clark was authorized to make the contract under which the rent was paid.

The petition for a rehearing on the part of the plaintiff must be overruled. The opinion will be adhered to, with the modification necessary to correct the oversight in regard to the allowance of interest as a part of the damages.

THE STATE v. FINDLEY.

1. **Criminal Law: SALE OF INTOXICATING LIQUORS.** A party cannot be convicted of the unlawful sale of intoxicating liquors upon the sole testimony of one in his employ that the witness upon one occasion sold to a purchaser a small quantity of liquor, without specifying in his testimony that it was the property of his employer or that the latter had any such liquor in his possession.

Appeal from Davis District Court.

THURSDAY, MARCH 22.

THE indictment charged "that the defendant, at Davis county, Iowa, on the first day of February, 1875, did then and there keep, use, and control a certain house in which he then and there unlawfully kept for sale, and did then and there unlawfully sell, intoxicating liquors." There was a jury trial, verdict of guilty and judgment, from which defendant appeals.

M. H. Jones, for appellant.

M. E. Cutts, Attorney General, for the State.

The State v. Findley.

SEEVERS, J.—The only evidence in relation to a sale of intoxicating liquors by defendant, or of his keeping such liquors for sale, is the testimony of one Mendenhall, and is as follows: “I am selling drugs for defendant in Bloomfield, Davis county, Iowa, and have been since February 15, 1875, at his store; I sold at that store a half-pint of whiskey with cinchona in it to T. O. Walker; I never sold any other kind of liquor there nor at any other time than that; it was before February 23, 1875; nor I never saw any other liquor, of any kind, sold there by anybody else at any other time.”

It will be seen there was no evidence tending to show that defendant knew of this sale, or that he kept intoxicating liquors for sale, or that there was any such in his possession or kept by him for any purpose. It is true the witness sold, in defendant's store, a half-pint of whiskey to Walker, but for aught that appears the witness may have brought it there in his pocket. The evidence fails to show there was ever any other liquor in the defendant's store or building than that sold by the witness to Walker. It is true that, if intoxicating liquor is found in the possession of the accused in any place except his private dwelling house, it is presumptive evidence such liquor was kept or held for sale contrary to law. Code, Sec. 1542; *State v. Norton*, 41 Iowa, 430. But there was no evidence tending to show that there was any such liquor in the defendant's possession, or under his control.

REVERSED.

Hanna v. Hawes.

HANNA V. HAWES ET AL.

1. **Will: LIMITED DEVISE: REMAINDER.** Where a will devised a certain sum with the condition that it should be invested in real estate, the income of which should be enjoyed by the devisee during life with remainder to the heirs of her body, and the executor in accordance therewith conveyed to the devisee certain lands by a deed which recited the provisions of the will respecting the devise, *held*, that the devisee possessed only a conditional estate in the lands and could not convey them to a third party to the exclusion of her heirs.

2. ——: CONVEYANCE: PRACTICE. While an action to set aside a conveyance by the devisee would properly be brought in the name of the heirs, yet in an action therefor by their guardian, where they are minors, the court has the power to protect their interests and defeat the alienation of the property.

3. ——: ——: ——. But the action cannot be maintained in behalf of the "minor heirs" of the deceased devisee, when the will of the ancestor provided that the estate should vest in the "heirs of her body."

4. ——: ——: PLEADING. In an equitable action thus improperly commenced, advantage may be taken of the error by a general demurrer, even though the demurrer be not in the precise language of the Code, the intention of the pleader to assail the defect being apparent.

Appeal from Louisa Circuit Court.

THURSDAY, MARCH 22.

THIS is an equitable proceeding, and the petition states "that the wards of the plaintiff, viz., William, James, Millie and Lilly Little are minor heirs of Sarah and Sylvester Little deceased." That Sarah was the daughter of Benj. Stoddard, who, by his will, which has been duly admitted to probate, devised to her \$2,000 to be invested in real estate, to hold said real estate during her natural life, and at her death the said lands so purchased with said \$2,000 were to become the property of the heirs of her body if there should be any. A copy of the will was attached to the petition and made an exhibit.

That in conformity with the provisions of the will Thomas Stoddard, the executor thereunder, conveyed the real estate in controversy to Sarah Little. A copy of said deed is attached to the petition and made an exhibit. That by the terms of

45	437
85	316
45	437
86	204
45	437
91	382
45	437
104	650
45	437
127	60

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the deed Sarah Little acquired only a life estate, but that she and her husband conveyed the premises by warranty deed to Isaiah Ogier; that the latter conveyed to Perry, who conveyed to defendant Hawes. "That plaintiff is the equitable and legal owner of said real estate in fee simple and entitled to the possession thereof; that the deeds to Ogier, Perry and Hawes are clouds on his title, and he asks a decree quieting and confirming the title in him, and setting aside and canceling said deeds, and for such other and further relief as may be just and proper." To the petition the following demurrer was filed by defendant Hawes:

"1. That by plaintiff's own showing he is not entitled to the relief prayed for, and that the facts stated by the plaintiff defeat the right of recovery in this action, and for special causes of demurrer defendant says:

"2. That by the terms of the will of said Benjamin Stoddard, deceased,* the \$2,000 legacy bequeathed to Mrs. Sarah Little vested in her an absolute estate upon the death of the testator.

"3. A bequest to a devisee and the heirs of her body vests an absolute estate in the immediate or first donee.

"4. The deed of Thomas Stoddard to Mrs. Little vested an indefeasible title in the grantee to the lands mentioned and described in said deed.

"5. The recitals in said deeds in relation to the will of Benjamin Stoddard deceased do not create a life estate in Mrs. Little; by such conveyance she took the fee with power of alienation, not simply a life estate. That from plaintiff's own showing the defendant holds the fee simple title absolute to said real estate, and that as guardian of said minor heirs he has no legal or equitable interest therein."

This demurrer was overruled, and defendant Hawes appeals.

J. & S. K. Tracy and Hurley & Hale, for appellants.

Tatlock & Wilson, for appellees.

SEEVERS, J.—I. As we understand, the plaintiff's title and right to the land rest solely on the will of Benj. Stoddard,

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and a conveyance from Thomas Stoddard, executor under the 1. WILL: him- will. We further understand counsel for defendant devisee: ants to concede that the following is a copy of so much of the will as refers to the devise in question:

"To my daughter, Sarah Little, wife of Sylvester Little, I give the sum of two thousand dollars, to be invested in lands, for my said daughter to have the income of the same during her life, and at her death to go to the heirs of her body, and, if none, to be divided equally between the surviving children of her mother, Sarah Stoddard; and, in case of my death before the execution of the above, I direct my executor to carry out my directions."

In conformity with the provisions of this will the executor conveyed the premises in controversy to "Sarah Little, wife of Sylvester Little, * * one of the heirs at law of the estate of Benj. Stoddard, * * who by his will, dated the 11th day of October, A. D. 1866, and admitted to probate in the county court of Louisa county, State of Iowa, on the 7th day of January, A. D. 1867, where will more fully appear, among the devises of said will, he willed and bequeathed that the sum of two thousand dollars should be invested in lands for the sole use of his daughter, Sarah Little, during her natural life, and at her death, under certain restrictions, to which this conveyance be subject, for the following lands or real estate, situate in the county of Louisa, State of Iowa: (*Here follows a description of the lands.*) To have and to hold the said premises with the appurtenances unto the said Sarah Little, wife of the said Sylvester Little, her heirs and assigns forever," followed by the usual covenants of warranty.

It is claimed on the one hand that under these instruments Sarah Little took a life estate only, and on the other that she thereby became vested with a title in fee simple, and that she could sell and convey said premises, and that her grantee obtained a title thereto in fee simple.

Keeping in view the cardinal principle that the intent of the testator, if possible, is to be ascertained in the construction of wills, we proceed to the discussion of the question presented.

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The testator did not give Sarah Little two thousand dollars absolutely to be used and controlled at her will and pleasure, but the devise was coupled with the charge that it should be invested in lands, the income derived from which she only could use and have the benefit of during her life, and at her death the lands were to become the property of the heirs of her body, if any such there were. No direction was given as to whom the title to the lands should be vested in during the life of Mrs. Little. The form in which the thing intended by the testator was to be done was left to the discretion of the executor.

The substance of the devise to Mrs. Little was that she should have the income during her life of two thousand dollars' worth of land, or in other words, of land purchased with the two thousand dollars set apart by the will for that purpose.

The executor was charged with a trust, a due execution of which required that he should see that the money was invested in lands, the income of which should be vested in Mrs. Little for life, and the title to vest in the heirs of her body, if any such there were at her death.

If the executor, in the execution of this trust, had vested the legal title to the land in John Doe, charged with the trust to permit Mrs. Little to receive the income during her life, and at her death to convey the title to the heirs of her body, the case would have been identical in principle with *Zuver v. Lyons*, 40 Iowa, 510, and it is there held, "if the estate limited to the ancestor be a trust estate, and the subsequent limitation to his heirs carries the legal estate, the two will not unite in an estate of inheritance in the ancestor, but the limitation to the heirs will be a contingent remainder."

A trust estate being created by the will, the executor had no power to enlarge or restrict whatever estate was so created. It is also apparent that he did not do so. The conveyance made by him sufficiently shows that he designed and intended thereby to carry out in good faith the trust, and this only he had the power to do. As between the parties to this estate, he did not have the power or authority to vest the legal title to the lands in Mrs. Little, discharged of the trust.

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Whatever estate she took was charged with the same trusts it would have been if the conveyance had been made to any other person.

Conceding the rule in *Shelley's case* to be law in this State it is not applicable, because the testator did not vest the legal estate in Mrs. Little with a limitation over to the heirs of her body.

The conveyance was made subject to certain restrictions contained in the will, the date of which together with that of its probate is given therein. This was sufficient to charge the defendants with notice of the trust.

It is not averred in the petition that the two thousand dollars devised to Mrs. Little was invested in the land in controversy; but it is averred that the conveyance of the land was made in conformity with the provisions of the will by the executor. In the absence of a motion for a more specific statement we are of the opinion this is sufficient.

Besides this, if the beneficiaries under the will are content with the execution of the trust it is difficult to see how any one else can complain.

II. It is urged that plaintiff has no legal capacity to sue, and it is insisted by appellee such objection has been waived.

2. —: ^{veyance:} con- We are unable to see why the action was not brought in the names of the infant children of Mrs. Little, so that in case of success the title of the real estate would vest in them instead of the plaintiff as their guardian. The court, however, would have the power by the terms of the decree to sufficiently protect the interest of the children in this respect, and the presumption is that it would do so.

The demurrer does not specify as one of the grounds thereof that the plaintiff had no legal capacity to sue in such clear and precise language as required by §§ 2648, 2649 of the Code. We are of the opinion that, if any of the causes mentioned in § 2648 as grounds of demurrer are intended to be relied on, they should be specified in an equitable action with the same certainty and precision as in a law action, except the fifth sub-division of said section, or they will be disregarded.

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The objection now urged was therefore properly disregarded in the court below, and the same result must follow here.

III. The plaintiff claims that at the death of Mrs. Little the title to the real estate in controversy was to vest in the ~~s. —: —:~~ "heirs of the body of Sarah Little," and the petition states that the wards of the plaintiff are "minor heirs of Sarah Little, deceased." Such being the case the appellant insists that the plaintiff has not shown a right to recover.

There is a clear and manifest difference between the "minor heirs of Sarah Little" and "heirs of her body." The latter only includes her children born of her body, while the former includes not only such but brothers and sisters or other relatives more remote still. We therefore feel constrained to hold the petition insufficient in this respect.

It is urged, however, by the appellee, this objection should ~~4. —: —:~~ be deemed waived or disregarded, because it was pleading. not specified as one of the grounds of demurrer.

It was held in *Allen v. Cerro Gordo County*, 34 Iowa, 54, where there was no general demurrer allowed in equitable actions, and certain causes specified as grounds of special demurrer only, that none other than such special causes could be urged and relied on.

We, however, hold the demurrer in the case at bar to be both general and special. It is true the general ground is not stated in the precise language used in the Code, but it is substantially the same, and this is all that is required. No one could mistake the intention of the pleader in this respect. None of the causes of demurrer mentioned in Sec. 2648 of the Code includes the objection now made, except the general cause allowed in equitable actions, and if such objection could not be urged under such general ground we are at a loss to know what could be. Such being the case we must presume the objection now under consideration was brought to the attention of the court below, and it therefore follows the objection has not been waived nor should it be disregarded.

REVERSED.

Dougherty v. Deeney.

DOUGHERTY V. DEENEY ET AL.

1. **Promissory Note: Payment: Instruction.** In an action upon a promissory note alleged to have been purchased by the defendant for the plaintiff's intestate, with money furnished by the latter, wherein defendant pleaded payment, it is proper to submit to the jury the question whether the transaction constituted a payment or a purchase of the note.
2. _____: **PRESUMPTION OF PAYMENT.** While the mere delivery of money by the payer to the holder of a note is presumptive evidence of payment, yet this presumption may be rebutted by circumstances.

Appeal from Allamakes Circuit Court.

THURSDAY, MARCH 22.

THE plaintiff, as administrator of the estate of Patrick Deeney, deceased, claims of the defendants the amount of a promissory note executed by the defendants, for the sum of \$281.80, payable to Charles O'Neil or order, and alleges that Patrick Deeney in his lifetime purchased the note, and it was transferred to him by delivery and assignment without indorsement.

The defendants deny that Patrick Deeney acquired the note by purchase, and that it was transferred to him by delivery and assignment; and allege that the note was paid by the defendant, John B. Deeney, to the payee thereof while the note was his property. There was a jury trial and a verdict and judgment for plaintiff for \$538.80. The defendants appeal. This case was before us upon a former appeal. See 41 Iowa, 19.

L. O. Hatch and L. E. Fellows, for appellants.

Dayton & Dayton and John T. Clark, for appellee.

DAY, J.—I. Evidence was introduced tending to show that Isaac Becktel was trustee of Charles O'Neil's estate, and

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managed it. The firm of Kerndt & Bros., of Lansing, made collections for Becktel, as such trustee, and had possession of the note in controversy. Moritz Kerndt, a member of this firm, produced a memorandum book of the firm, upon which entries were first made, and also book "J," to which the entries were transferred the same evening, or the next day. There is an entry upon the memorandum book as follows:

"June 17, 1867, Isaac Becktel, Cr. Cash by Deeney, \$250." In book "J" there is an entry as follows: "June 17, 1867, Isaac Becktel, Cr. Cash by P. Deeney f note \$250.00." The witness testified that the entry in book "J" would indicate that \$250 paid a note or was paid on a note.

The defendant, John B. Deeney, son of Patrick Deeney, deceased, testified as follows: "I paid the note in question to Guss Kerndt in his store in Lansing, and got the note from him; Harkins, John T. Clark, and my father, Patrick Deeney, were present at the time; I paid the note the 16th or 17th of June, 1867; I paid \$250 in money; nothing had been paid on the note before; I got the money from my father, in Kerndt's store; I handed the money to Guss Kerndt and he handed me my note." The witness further testified that he brought the note home and put it in an account book in his bureau drawer, which was unlocked, and that he never saw it again during the lifetime of his father.

The wife of the defendant, John B. Deeney, testified the same, substantially, as to the placing of the note in the bureau drawer. At the time of this transaction Patrick Deeney lived with his son John B. Deeney. Sometime in 1868 Patrick Deeney went to live with his son, James B. Deeney, and remained about three months, when he returned to John B.'s. He remained with John until about nine months before his death, when he went to live with James, where he died, in February, 1874. In 1868 he gave the note in question to the wife of James B. Deeney, and told her to put it away. The note remained at the house of James B. until the plaintiff took possession of it as the administrator of the estate of Patrick Deeney.

The court gave the jury the following, amongst other in-

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structions: "That the note in question was in the hands of Kerndt & Bro., and that it was paid by either John B. Deeney or purchased by his father, Patrick Deeney, there is no dispute; but you are to determine whether the transaction at Kerndt's, in Lansing, was a payment of the note by John B. Deeney, or a purchase of the note by his father, Patrick Deeney. The evidence undisputed is that Patrick Deeney handed the money to John B. Deeney, which was given to Kerndt & Bro. for the note; and it is for you to say what the understanding was between John B. Deeney and his father, as to whether the transaction there was a payment of the note for John B. Deeney, or a purchase of the note for Patrick Deeney.

"If it was the understanding between John B. and Patrick Deeney that the note should be taken up and held by or for Patrick Deeney till it should be paid to him, then the transaction was a purchase of the note, and it is the property of the estate.

"If it was the understanding that the note was to be kept for the use of the father, in consideration of his furnishing the money with which to obtain it, and John B. took it home and put it in his drawer and the father afterward took it out, such fact would not defeat the right to recover on the note."

The defendants excepted to these instructions and now assign the giving of them as error. It is insisted that there is no testimony to which they are pertinent. It is certain, however, that the note was bought by Patrick Deeney, or paid by John B., and it cannot be denied that there are circumstances which raise a presumption, more or less strong, that John B. did not pay the note. These are the facts that he put it away in his drawer without cancellation or mutilation, and that it was afterward in the possession of Patrick Deeney, which raises a presumption that the note was his. See this case on the former appeal, 41 Iowa, 19 (21). From these facts the jury might fairly infer that the note had been bought by Patrick Deeney, and had not been paid by John B., as he claims. It was competent for the court to submit the deter-

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mination of the question to the jury; and it was properly done in these instructions.

II. The defendants assign as error the refusal of the court to give the following instruction: "In the absence of proof 2. ____: pre- explaining by what arrangement the defendant got sumption of payment. the money from his father the legal presumption is that the father owed him that amount. In other words, if you believe that Patrick Deeney furnished to his son the money with which the note was obtained, and there is no proof of what the contract was between the father and the son in regard to the money, the legal presumption is that the father, in handing the money to the son, was paying the son a debt of that amount."

Appellants cite and rely upon 1 Greenleaf on Evidence, section 38, as follows: "But the mere delivery of money by one to another, or of a bank check, or the transfer of stocks, unexplained, is presumptive evidence of the payment of an antecedent debt, and not of a loan."

If nothing had been proved but the *mere delivery* of the money to John B. Deeney, the instruction asked would have been proper. But here there were several explanatory circumstances. The money was immediately employed in lifting a note which John B. owed; this note was put away without any mark to indicate payment; it was afterward in the possession of Patrick Deeney. These circumstances tend to explain and qualify the act of handing over the money to John B., and remove the presumption which might have existed if no fact other than the handing over of the money had been proved. The refusal to give this instruction was not error.

III. It is claimed that the verdict is not supported by the evidence. John B. Deeney testifies that he paid the note, but there are circumstances in the testimony inconsistent with his testimony. If we were to determine the question *de novo* we might reach a conclusion different from that of the jury. But the verdict is not without evidence to warrant it. The record discloses no error.

AFFIRMED.

Phelps v. Finn.

PHELPS V. FINN.

1. **Redemption: JUNIOR LIEN: EVIDENCE.** P. recovered a judgment against Q. for the purchase money of the latter's homestead, and purchased the property at execution sale for less than the amount of his debt. F. also recovered judgment against Q. after the date of P.'s judgment upon a claim alleged to antedate the purchase of the homestead: *Held.*

1. That F. could show *aliunde* that the debt was contracted before the acquisition of the homestead.
2. That he was entitled to redeem from P.'s purchase upon payment of the amount of his bid.

Appeal from Winneshiek Circuit Court.

THURSDAY, MARCH 22.

This is an action in equity to set aside a sheriff's deed for lot 4 in block 15, in the town of Decorah, to the defendant, John Finn, and for a decree directing the sheriff to execute a deed for said premises to the plaintiff.

The parties agreed that certain portions of the pleadings were true, and submitted the case upon the petition, answer, reply and their stipulation. The court dismissed plaintiff's petition, and rendered judgment against him for costs. Plaintiff appeals.

Adams & Bullis, for appellant.

E. E. Cooley, for appellees.

DAY, CH. J.—The facts collated from the stipulation of the parties are as follows: On the 16th day of October, 1873, the plaintiff recovered a judgment against the defendant, Peter Quinn, for the sum of \$273.80, for the purchase money of lot 4, in block 15, in Decorah, and a decree that the same be sold under said judgment. On the 22d day of December, 1874, a special execution issued for the sale of said premises, and, on the 23d day of January, 1875, the same were sold to the plaintiff for the sum of \$100, and a certificate of purchase was duly

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executed and delivered therefor. The balance of the judgment in favor of plaintiff remains unpaid. The premises in question have been occupied and used as the homestead of the defendants, Peter and Mary Quinn, without interruption, since the 14th day of September, 1871. In March, 1870, when Peter and Mary Quinn had no homestead whatever, the defendant Finn loaned Quinn the sum of \$50. On the 26th day of December, 1874, Finn commenced an action against Quinn, before a justice of the peace, to recover the money loaned, with interest, and on the 31st day of December Finn recovered judgment in said action for the sum of \$59 and costs. A transcript of this judgment was, on the day of its recovery, docketed in the office of the clerk of the Circuit Court of Winneshiek county. On the 22d day of October, 1875, and within nine months of the date of the sale on execution to plaintiff, Finn paid the sum of \$107.50 into the office of the clerk of the District Court, in redemption from said sale, and filed his affidavit stating the amount unpaid and due on his own claim. No redemption of the premises from Finn was made by any one. In pursuance of said sale on execution and of Finn's redemption, the defendant, Wolmeldorf, as sheriff, on the 1st day of February, 1876, executed to Finn a deed for said premises. The said judgment recovered by Finn does not show that it was rendered upon an indebtedness contracted before the acquisition of the homestead by Quinn, and plaintiff had no notice, actual or constructive, prior to the commencement of this suit, that said judgment was rendered upon a debt so contracted. At no time prior to the commencement of this suit did Finn attest the *bona fides* of the antecedent character claimed for his judgment debt by proceedings in court, or by affidavit, or in any other manner.

Two questions are presented for our consideration: First, had Finn a right to redeem. Second, if Finn had a right to redeem can the plaintiff now redeem from him.

I. Section 3103 of the Code provides that any creditor of the defendant, whose demand is a lien upon the real estate sold, may redeem the same at any time within ^{1. REDEMP-} _{ITION: junior} nine months from the day of sale. 'If the property

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in controversy were not the homestead of the debtor there could be no question of the right of redemption. Section 1992 of the Code provides that the homestead may be sold for debts contracted prior to the purchase thereof. It is conceded that the indebtedness upon which Finn recovered his judgment was contracted before Quinn purchased the homestead in question, but it is claimed that the judgment did not become a lien upon the homestead, and did not entitle Finn to redeem, because the judgment and the record connected with it do not show that the debt upon which the judgment was rendered was contracted before the acquisition of the homestead; and it is insisted that it is not competent for Finn to prove *aliunde*, as against plaintiff, that the debt was in fact so contracted. It is conceded that, as against the judgment debtor and his heirs, such proof would be admissible. *Delavan v. Pratt*, 19 Iowa, 429. But it is insisted that the execution purchaser occupies a higher plane, and that, as to him, a party cannot extend the lien of his judgment by proof *aliunde*; this view we believe to be unsound, and the position untenable.

It may be admitted, and, perhaps should be admitted, as was suggested in *Delavan v. Pratt*, 19 Iowa, 432, that, as between the judgment creditor and third persons acquiring an interest in ignorance of the facts, such proof would not be competent. But this principle can apply only to persons whose rights would be prejudicially affected by such proof, and who have an equitable right to protection. The plaintiff is not in that position; he made his bid upon the property with full knowledge that other lien creditors would have the right to redeem from him by paying the amount of his bid and interest. If he bid the full value of the property, he is not prejudiced and has no right to complain that he has been re-paid this amount with interest. If, upon the other hand, he bid less than the value of the property, believing that there was no lien creditor to redeem, and that he would, if the property was not redeemed by the judgment debtor, get it for much less than its value, and still have the greater part of his debt unsatisfied, he ought not to be heard to complain that he has lost this advantage. The plaintiff is now seeking relief in

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a court of equity, and he ought not to be permitted to show that his bid was much less than the value of the property, and that his rights will be prejudiced if he is not now permitted to bid more. In *Hale v. Heaslip*, 16 Iowa, 451, it is said: "As against antecedent debts, or debts created for the purchase money, the homestead exemption does not apply, and judgments founded upon such debts would be held to be liens upon the property, certainly as against persons chargeable with notice of the character of the debt."

We are clearly of opinion that plaintiff is not entitled to protection against such lien, and that Finn had the right to redeem from the execution sale.

II. In the event of its being determined that Finn had the right to redeem, plaintiff asks that he now be permitted to redeem from Finn. Without determining whether, in any event, the plaintiff, who is the senior lien holder, after fixing his valuation upon the property and bidding that amount, could redeem from a junior creditor who had redeemed from him, it is clear that this right could not be exercised after the expiration of a year from the time of sale. Code, Sections 3102, 3103, 3111, 3116. The judgment is

AFFIRMED.

GOULD V. THOMPSON ET AL.

1. **Tax Deed: EFFECT OF.** A tax deed, regular upon its face, is conclusive evidence of the fact of a lawful sale.
2. **—: SECOND DEED.** Where a deed does not conform in its recitals to the facts, the treasurer is authorized to execute a second and corrected deed, but he has no power to execute a second deed which shall misstate the facts respecting any proceedings prior to its execution, and such deed, if executed, would be void.

Appeal from Decatur Circuit Court.

THURSDAY, MARCH 22.

ACTION in chancery to recover certain land and quiet the title thereof in plaintiff. The defendants claim title under a

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tax sale and deed. There was a decree quieting the title in plaintiff and awarding him possession of the land and a judgment rendered against him for the value of the improvements made on the land by defendants, and for the amount expended by them in the purchase at the tax sale and in payment of taxes and for the penalty and interest thereon, as well as costs of the suit. Both parties appeal.

W. H. Robb and C. C. McIntire, for plaintiff.

J. B. Morrison and E. W. Haskett, for defendants.

BECK, J.—I. The lands in controversy, with other tracts, were sold for taxes *en masse* and a deed, so reciting the sale, was executed to the purchaser. Subsequently another deed was executed upon the same sale, reciting that the lands were sold in parcels as required by law. The defendants claim title under the second deed. The sale as made, and the first deed, were void and did not convey the title to the land, under frequent decisions of this court.

It is insisted by defendants that as the second deed recites a lawful sale of the property it is conclusive evidence of such a ^{1. TAX DEED:} sale, as it is a valid instrument executed in pursuance of law. This position is based upon the effect given to tax deeds, lawfully executed, by prior decisions of this court in *McCready v. Sexton*, 29 Iowa, 356, and other cases involving the same questions. If the second deed was lawfully executed, and is a valid instrument, the defendants' argument is sound and their conclusion correct. The title of defendants depends wholly upon the validity of this deed, which will now be the subject of our inquiry.

II. This court has more than once held that after the execution of a tax deed by the treasurer, which is irregular or ^{2. ____: sec-} does not conform in its recitals to the facts, as exhibited by the tax records, another deed conforming thereto and regular upon its face may be executed and will be valid. *McCready v. Sexton & Son*, 29 Iowa, 356; *Genthaler v. Fuller*, 36 Id., 604; *Bulkley v. Callanan*, 32 Id.,

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461. But this authority to execute a second deed is conferred upon the treasurer in order to correct errors committed in the first, to the end that the tax deed may conform, in its recitals, conditions and descriptions, to the tax record and the facts of the case which should appear in the instrument. The authority does not exist for the perversion of truth; it is not conferred to enable the officer to overthrow, by false recitals in a deed, the records upon which it is based. It is to be exercised only to attain the ends of truth and right. This doctrine is found in the cases just cited.

We conclude that the second deed, not being executed to correct a mistake, misdescription, incorrect recital or other matter in conflict with facts, but on the other hand with the object of perverting truth and falsifying the tax record, is void. Defendants hold no title under it. This conclusion disposes of the case upon defendants' appeal; the decision of the Circuit Court is affirmed thereon.

III. The only objection to this judgment made upon plaintiff's appeal is that costs should not have been taxed against him, having tendered to the defendants the amount they recovered for improvements, taxes, etc. But we do not find that the abstracts show the tender as claimed by plaintiff. His objection, therefore, is without support. The judgment of the court below will be affirmed also on plaintiff's appeal. The costs of the appeals will be paid by the party making them.

AFFIRMED ON BOTH APPEALS.

Sully v. Poorbaugh.

SULLY V. POORBAUGH.

1. **Taxation: swamp lands.** Lands granted by the United States to the counties as swamp lands are not subject to taxation so long as they are held and owned by the counties.
2. _____ : _____. **TIME OF CONVEYANCE.** Nor are they taxable for any year in which they may be conveyed by a county, if the assessment for that year be completed before the conveyance is made.
3. **Tax Sale: when deed is set aside: rights of owner.** When a tax deed is set aside on the ground that the lands were the property of the county at the time they were sold for taxes, the owner is not required to reimburse the purchaser for the amount he paid, and pay him in addition the interest and penalty.

Appeal from Jasper District Court.

THURSDAY, MARCH 22.

THIS is a suit in equity brought by plaintiff to settle and quiet his title to one hundred and twenty acres of land. He alleges that he was the owner thereof by virtue of certain tax deeds; that the lands were sold for the taxes of 1864, and his deeds were made therefor in 1868; that the taxes were duly levied and unpaid, and all the proceedings prior to his deeds were had in accordance with law. He also avers that the defendant claims to have some interest therein.

The defendant, for answer, denies that the plaintiff is the owner of the lands; denies that the proceedings were in accordance with law, and avers that said lands were not subject to taxation for 1864; that there was a fraudulent combination among the bidders at the tax sale, and also sets up other defenses, and offers to pay the amount of taxes, penalty and interest, that may be due to the plaintiff. He asks that the tax deeds of plaintiff may be set aside and the defendant's title quieted.

There was a trial upon written evidence, and the court found that there was a fraudulent combination among the bidders at the tax sale, whereby the sale of the land in con-

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troversy was void and adjudged the title to the defendant. Plaintiff appeals.

R. A. Sankey, for appellant.

M. E. Cutts, for appellee.

ROTHROCK, J.—I. We have each carefully examined the evidence and are united in the opinion that it is not sufficient to establish that there was any fraudulent combination among the bidders at the sale; at least, it is not sufficient to warrant us in holding the sale void under the rule settled by this court. See *Eldridge v. Kuehl*, 27 Iowa, 160, and *Kerwer v. Allen*, 31 Iowa, 578. The evidence upon this branch of the case is somewhat voluminous, and is conflicting, and a review of it here would serve no useful purpose.

II. Upon the trial the defendant introduced in evidence the certificate of the Register of the State Land Office, showing that the land in controversy was conveyed to the State of Iowa by the United States, in Swamp Land Patent No. 2, dated January 10, 1860, as appears from the original patent from the United States to the State of Iowa, on file in his office. There was no objection made to this evidence in the court below, nor any motion made to exclude it; but it was offered and received as competent and we must so regard it. If proper objection had been made, and the certificate had been excluded, the defendant might then have been able to introduce the original patent or a copy thereof, or a copy of the original entries. The defendant also introduced a deed from the county of Jasper to himself for eighty acres of the land in controversy. This deed was executed and acknowledged on the 13th day of May, 1864.

It appears then, from the evidence, that the whole of the land was patented by the United States to the State of Iowa, January 10, 1860, and that eighty acres thereof was conveyed by Jasper county to the defendant on the 13th day of May, 1864. By section 925 of the Revision of 1860 the swamp lands in the several counties were granted to the counties in which they were situated. In the absence of any objection

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to the evidence in the court below, we think the title to the eighty acres conveyed by the county to the defendant was sufficiently shown.

The land in controversy, being swamp land, was not liable to taxation so long as it was held and owned by the county.

1. TAXATION: *County of Guthrie v. Carroll County*, 34 Iowa, swamp lands. 108. Was this land liable to taxation for the year 1864? We think not.

By section 736 of the Revision of 1860 one of the duplicate assessment books was required to be completed and delivered ~~2. —: —~~ to the township clerk on or before the second time of conveyance. Monday in April in each year; and the other book was required to be delivered to the clerk of the board of supervisors on or before the third Monday in May. The assessment for each year was, therefore, required to be closed on or before the second Monday in April. The conveyance from the county to the defendant was after the close of the assessment, and should have been passed for that year as not subject to taxation. *Des Moines Navigation and Railroad Company v. The County of Polk*, 10 Iowa, 1; *Tallman v. The Treasurer of Butler County*, 12 Id., 531. It is true that no assessment of real estate was required to be made for the year 1864, but we believe it to be a correct rule in all cases that property which is exempt from taxation until after the expiration of the period provided by law for assessment should be passed for that year, and included in the assessment for the next year.

III. The defendant introduced no evidence showing title to the other forty acres in controversy, being the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 36, Tp. 80, range 21. As it was sold for taxes for the year 1864, and a deed executed therefor regular in form, it was incumbent on the defendant to show not only title in himself, but that the deed was in some way invalid. Having failed to do this there should have been a decree quieting plaintiff's title to this part of the land.

IV. It is urged by counsel for appellant that the court below erred in not requiring defendant to pay the taxes, interest and penalty, which he would be required to pay in

McDonald & Co. v. Bennett.

case the land had not been sold for taxes. The case of *Everett v. Beebe*, 37 Iowa, 452, and other cases, following the rule there announced, have no application to the case at bar. In those cases the land was liable to taxation. In this case the land purchased by defendant from the county was exempt for the year for which it was sold for taxes, and the state and county had no claim upon it for taxes to which plaintiff could be subrogated. It appears, from the evidence, that the defendant has paid all taxes upon the land since 1864.

The decree of the District Court will be affirmed as to the eighty acres conveyed by the county to the defendant, and reversed as to the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 36, Tp. 80, range 21.

MODIFIED AND AFFIRMED.

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McDONALD & Co. v. BENNETT.

1. **Lien:** LIVERY STABLE KEEPER HAS NONE. A livery stable keeper has no lien for care and feeding upon a horse delivered to him for keeping, in the absence of a special agreement therefor.
2. ——: CONSTRUCTION OF STATUTE. Such a lien is not conferred by section 2177 of the Code.

Appeal from Pottawattamie Circuit Court.

TUESDAY, MARCH 20.

THIS is an action of replevin for one span of bay horses and other property, the possession of which plaintiff claims under a chattel mortgage executed to him by one Frank Robinson.

The defendant denies plaintiff's right to the possession of the property, and alleges that from the 20th day of June to the 17th day of November, 1875, he kept, cared for and fed said property under a contract with the owner thereof, Frank Robinson; that his charges have not been paid, and he has a lien thereon until his charges are paid. The cause was tried

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by the court and judgment was rendered for the plaintiff. Defendant appeals.

Sapp & Lyman, for appellant.

R. P. Foss and *E. R. Paige*, for appellee.

DAY, J.—The court found the facts to be substantially as follows: On the 5th day of September, 1874, Frank Robinson, the owner of the property in controversy, executed a chattel mortgage thereon to plaintiff, which was recorded on the 10th day of September, 1874. The mortgaged property was permitted to remain in the possession of the mortgagor. On the 20th day of June, 1875, Robinson employed the defendant, who is a livery stable keeper, to feed and care for the property in controversy, and delivered it to the defendant, who kept the same until it was taken from him on the writ of replevin, and was to receive six dollars per week for his care and feed. At the commencement of the suit there was due the defendant for keeping the property the sum of \$116.91. Defendant had no actual notice of the mortgage. Before the commencement of suit plaintiff demanded the property in dispute, and the defendant refused to deliver the same till his charges were paid. As a conclusion of law the court found that defendant has no lien on the property in dispute as against the plaintiffs.

I. It is fully settled that at common law a livery stable keeper has no lien for his care and feeding upon horses left ^{1. LIEN: livery} with him. Such lien exists in favor of an inn-stable keeper, principally upon the ground that he is bound to entertain and provide for any one who presents himself in proper condition as a guest. The keeper of a livery stable is under no such obligation to take and feed the horse of a customer. Of the many cases cited by appellant not one of them sustains the existence of a lien in favor of the keeper of a livery stable, except *Young v. Kimball*, 23 Penn. St., 193, and in that case the lien was created by statute. In *Grinnell v. Cook*, 3 Hill, 485, it is said: "The right of lien has always been admitted where the party was bound by law to receive the goods; and in modern times the right has been

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extended so far that it may now be laid down as a general rule that every bailee for hire, who by his labor and skill has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. This includes all such mechanics, tradesmen and laborers as receive property for the purpose of repairing, or otherwise improving its condition. But the rule does not extend to a livery stable keeper for the reason that he only keeps the horse, without imparting any new value to the animal. And besides, he does not come within the policy of the law which gives the lien for the benefit of trade. Upon the same reasons the agister or farmer who pastures the horses or cattle of another has no lien for their keeping unless there be a special agreement to that effect." The same doctrine is announced in the following cases: *Bevan v. Waters*, 3 C. & P., 520; *Miller v. Marston*, 35 Maine, 153; *Fox v. McGregor*, 11 Barb., 41; *Judson v. Etheridge*, 1 Cr. & M., 743; *Jackson v. Cummins*, 5 M. & W., 341; *Hickman v. Thomas*, 16 Ala., 666.

II. Appellant claims, however, that a lien is given by section 2177 of the Code. This section is as follows: "Personal property transported by or stored or left with any warehouseman, forwarding and commission merchant, or other depository, express company or carriers, shall be subject to a lien for the just and lawful charges on the same, and for the transportation, advances and storage thereof." It is claimed that the words *other depository* include a livery stable keeper. It is not necessary, perhaps not proper, that we should now undertake to put a definitive construction upon this section, and declare to what it does and does not apply. It is sufficient in this case to say that in our opinion it does not give a livery stable keeper a lien upon the horse of a customer fed at his stable. No one would think of saying that his horse kept at a livery stable to be fed was deposited with the keeper of the stable, or that the livery stable keeper was the depository of the horse. The judgment is

AFFIRMED.

Van Tuyl v. Quinton.

VAN TUYL v. QUINTON.

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1. **Evidence: DECLARATIONS: DAMAGES.** A party is permitted to testify to the statements made by him to another, which were the inducement to the act of the latter, in an action to charge him with damages for the act.
2. **Instruction: WHEN MISLEADING.** An instruction is erroneous, even if it embraces correct propositions of law, which has a tendency to mislead the jury by implying that other conditions than those involved in the evidence are necessary to the determination of the case.

Appeal from Lee District Court.

TUESDAY, APRIL 3.

THE petition of plaintiff alleges that Frank Quinton, a minor son of and residing with the defendant, with defendant's knowledge, consent, approval and direction came on plaintiff's land, where his two sons aged thirteen and fifteen were engaged with two teams in harrowing, and wantonly, wrongfully and maliciously, twice fired a shot gun at plaintiff's dog, near the teams, killing the dog and frightening the horses, causing one of the teams, consisting of two three year old colts, to become unmanageable and run away with the harrow, whereby one of them was badly sprained, the team was rendered untrustworthy, and the harness and harrow were torn and damaged, wherefore plaintiff claims of defendant the sum of one thousand dollars.

The answer denies all the material allegations in the petition, and alleges that plaintiff's dog was worrying and killing defendant's sheep, and to prevent a repetition thereof the defendant's son Frank, without the knowledge of defendant, shot and killed plaintiff's dog.

There was a jury trial, and a verdict for plaintiff for \$200. The motion for new trial was overruled, and judgment was entered upon the verdict. The defendant appeals.

*Gillmore & Anderson and Casey & Hobbs, for appellant.**Van Valkenburg & Hamilton, for appellee.*

Van Tuyl v. Quinton.

DAY, CH. J.—I. The farms of plaintiff and defendant adjoin. On the day of the transaction complained of defendant ^{1. EVIDENCE:} heard a dog barking in his field, and saw his cattle ^{declarations: damages.} gathered together, and his sheep running in different directions in the pasture. The defendant took his shot gun, one barrel of which was loaded, jumped on a pony and rode across the field to where his son Frank was running a drill in a field adjoining the pasture, and told him to take the gun, and if there was a dog worrying the sheep to shoot him. Frank got on the pony, rode in the direction of the sound of the dog, shot, and came back and told his father what he had done. The defendant then told Frank to kill the dog.

On plaintiff's motion all the declarations of Frank with regard to shooting the dog were stricken out of the testimony of the defendant. This was error. The first shot was fired in defendant's field. The subsequent shots did the injury of which complaint is made. The pivotal question in the case is whether Frank was the agent of defendant to pursue the dog into plaintiff's field and kill him there. The information upon which defendant acted has an important bearing upon this question. Suppose Frank had told his father that the shot had broken all the dog's legs, and that he was thus lying where he fell. This information would certainly have some bearing upon, and would tend to explain what was comprehended in the order to go and kill him. This evidence is not hearsay. The question is not whether what Frank told the defendant was true, but upon what information and under what circumstances did defendant act. See 1 Greenleaf on Evidence, Section 101.

But whilst the exclusion of this evidence was error, we think it was error without prejudice.

Frank Quinton testified fully as to the information he conveyed to the defendant. He says: "As I passed by father going to the house, I told him the dog had killed one sheep and was killing another. I told him I had wounded the dog, and asked him if I should kill him; he said 'yes.'" It is not claimed that the defendant would have testified at all differently from this testimony of Frank, but it is said if the

Van Tuyl v. Quinton.

defendant's testimony had been admitted there would have been two witnesses to the fact instead of one, and that defendant is prejudiced in being restricted to one witness to a fact which he was able to prove by two. This would be true if there was any conflict in the testimony respecting the fact, or any impeachment of the remaining witness. In this case there was no such conflict, and no impeachment. The fact was proved by one credible witness, and was not contradicted. The jury had no right to disregard the testimony of Frank, and we must presume that they performed their duty and accepted this testimony as true.

II. The defendant testified as follows: "I said to Frank that if Van Tuyl's dog was lying wounded where he shot him to load the gun again and go and kill him. He was lying there a few rods from where he shot him in the first place. It was my belief that the dog was a few rods from where he was wounded. I supposed the dog to be wounded in my pasture where the sheep was. I told Frank to load the gun and kill the dog where he was lying."

The testimony of Frank Quinton in substance is that he went to the house and loaded both barrels of the gun and returned to where the dog lay down when first shot. When he came within sixty or seventy yards of the dog he got up and crossed over into plaintiff's field in the direction of plaintiff's house. Frank took a rider off the fence, jumped the pony over, followed the dog into plaintiff's field, and shot him twice, the last shot killing him. Plaintiff's team took fright and ran away.

The court instructed as follows: "If you find from the evidence that the defendant instructed his son to shoot the dog on his own land for worrying sheep, and his said son so understood him, and said son purposely and maliciously, with the design to gratify his own desire and passion or ill will, disregarded his father's instructions and against his father's will went on plaintiff's land and caused the injuries complained of, then defendant will not be liable in this action, and your verdict should be for defendant." The giving of this instruction is assigned as error. It is very certain that if all these things

Van Tuyl v. Quinton.

were found to exist the verdict should be for defendant. It is equally true that if a part of the things enumerated were found to exist the verdict should be for the defendant. The error of the instruction is not in its misstatement of a legal proposition, but in its tendency to mislead. The instruction undertakes to state the condition under which defendant would not be liable. It is true the instruction does not state that no other circumstances would exonerate the defendant. But no other instruction covering this branch of the case was given, and the jury would naturally infer, or at least might infer, that a concurrence of all these circumstances was necessary before defendant could be exonerated. In other words the jury may have inferred that if Frank simply *purposely disregarded his father's instructions and went on plaintiff's land and caused the injuries complained of against his father's will*, the father would be liable, and that to remove the father's liability Frank must have disregarded instructions *maliciously, with design to gratify his own desire, or passion or ill will*.

If Frank purposely disregarded his father's instructions, the motives which may have actuated him thereto are immaterial. We think the defendant may have been prejudiced by this instruction.

III. A clerical error occurred in the 9th instruction in the use of the word "defendant" for "plaintiff." As the cause is reversed on other grounds, it is not necessary to determine whether this mistake worked any prejudice. We do not, at present, discover any other material or prejudicial error. For the error in the fifth instruction the cause is

REVERSED.

Sanders v. Godding.

SANDERS ET AL. V. GODDING ET AL.

1. **Estoppel: WHAT WILL NOT CREATE: STATUTE OF LIMITATIONS.** Possession of land, taken without a valid title thereto, after a termination of occupancy by the owner and a failure to pay the taxes thereon, will not estop him to subsequently assert his title when the possession has not been continued long enough to entitle the occupant to the protection of the statute of limitations.
2. **Deed: CONSTRUCTION: DISTANCES AND AREAS.** Where the distances and areas in the description of a deed do not correspond so as to describe the same quantity of land, the terms describing the distances will control that describing the area, and measure the quantity conveyed, in the absence of words indicating that the latter is to prevail.

Appeal from Boone Circuit Court.

TUESDAY, APRIL 3.

ACTION to recover the possession of certain land. The defendants, in their answer, deny generally every allegation of the petition, and, averring that they have had actual adverse possession of the land for more than ten years, they plead the statute of limitation in bar of the action. They also plead an equitable defense, which is set out in the opinion. The cause was tried to the court without a jury, and judgment had for plaintiffs; defendants appeal. The facts of the case involved in the questions of law ruled upon in the opinion appear therein.

I. N. Kidder, for appellants.

Hull & Ramsey, for appellees.

BECK, J.—I. The parties trace the titles under which they respectively claim to a common source. Plaintiffs claim under the first, or older deed, and defendants under the second, or junior deed; both instruments being executed by the same grantor and conveying the lands in controversy. Defendants insist that possession, of the character which will bar this action, has been held by them and their grantors for

Sanders v. Godding.

more than ten years; therefore they relied upon the protection of the statute of limitations in the court below. It is now insisted that the Circuit Court erred in not sustaining this defense. The cause is reviewable here upon errors assigned, and is not triable *de novo*. Upon the question of the possession of defendants there was conflict in the evidence, some of the witnesses fixing its commencement within ten years, and others prior to that period. In this state of the record we cannot interfere with the conclusion upon the facts reached by the Circuit Court. While the preponderance of the testimony may have been in support of defendants' answer, we cannot say that there was such absence of proof as warrants the conclusion that the decision of the court below was not rendered in the exercise of judicial discretion fairly applied to the evidence.

II. The equitable defense pleaded in defendants' answer, and relied upon in this court, is to the effect that plaintiffs' ancestor abandoned the land, and the possession thereof was taken by defendants' grantor, or prior to limitation, grantors under whom they claim, who laid off the land into town lots and sold them as such, the defendants and those under whom they claim paying taxes thereon. Upon these facts it is claimed that plaintiffs are now estopped to set up title. The court found the facts and law against defendants under the issues raised by this defense. The finding of facts is not in conflict with the evidence. It may be remarked that what is called an abandonment, as shown by the evidence, was the termination of the occupancy of the land by plaintiffs' ancestor, and the failure to pay taxes, both by the ancestor and the plaintiffs. Possession was taken of the land by those under whom defendants claim, and the property was treated by them as their own. We know of no principle of law which will raise an estoppel against the recovery of land, by the one holding the legal title, upon such facts. Had possession, of the character required by law, been held by defendants for the period prescribed, the statute of limitations would have interposed a bar to the action. But we have seen that there is no ground to interfere with the Circuit Court's

1. ESTOPPEL: what will not create statute of limitations.

Sanders v. Godding.

decision upon this defense. Possession of land, which will not invoke the protection of the statute of limitations, will not create an equitable estoppel against a claimant.

III. It is insisted by the defendants that the court erred in adjudging that plaintiffs were entitled to recover the entire tract of land, on the ground that the evidence discloses that the mother of the plaintiffs is living, who is entitled to one-third of the land as her dower. It is sufficient to say that no such defense was raised in the pleadings, nor in any manner urged in the court below. It cannot be first considered in this court.

IV. The deed under which plaintiffs acquired title to the land describes it as follows: "Comming at the NE. corner of the acre lot sold by said grantor to N. B. Capron, and dated with this conveyance, thence east 12 rods and 80 links, thence south 12 rods and 50 links, thence west 12 rods and 80 links, thence north 12 rods and 50 links to the place of beginning, said tract to contain just one acre, and the distances shall be so construed." A question of construction arises upon this description in determining the quantity of land conveyed by the deed. The distances given measure an area greater than that specified in the description. It is highly probable that the parties, in using the word *links*, intended some length of the lines other than that indicated by the true meaning of the term. The length of the lines, as expressed in the deed, are respectively 15 and $14\frac{1}{2}$ rods. The unusual and erroneous expression of these distances leads to the conclusion that the true length of a link was not understood by the parties to the deed. But these considerations could have no weight in construing the description, in the absence of words showing an intention different from that expressed by the language referred to above.

In descriptions of this character distances control areas described by quantities, in the absence of words indicating that the latter are to prevail. In the case before us the intention is clearly expressed that the specified quantity shall be one acre and that the distances given shall be construed to circumscribe an acre and no more. That it is competent for

The Sterling School Furniture Company v. Harvey.

parties so to contract as to suspend the application of recognized rules of construction to their deeds there can be no doubt. In all instruments parties may fix rules for the interpretation of their language and the construction of their covenants, though such rules be in conflict with those ordinarily recognized by law. This authority is secured to all as a natural right. It is of the very essence of the power to contract, and, unless forbidden by law, if that may be, must be recognized by the courts. The land conveyed by the deed is, by its very terms, of the area of one acre. It is to be circumscribed by lines corresponding in length with the distances mentioned in the deed. These may be easily determined by substituting in the place of the word "*links*," wherever it occurs, the term *hundredths of a rod*, which will give the precise area of one acre. We are led to conclude that the parties erroneously supposed that a *link* was the one-hundredth part of a rod, as it is of a chain. But, be this as it may, the distances as indicated here will circumscribe one acre.

The Circuit Court, in construing the description of the land, gave control to the distances instead of the area. In this there was error, for which the judgment must be reversed and the cause remanded.

REVERSED.

THE STERLING SCHOOL FURNITURE COMPANY v. HARVEY ET AL.

1. **Taxation : LIMITATION UPON : SCHOOL DISTRICT.** The board of supervisors are not authorized to levy a tax for the payment of a judgment against the school house fund of a district township, when the tax already levied for the use of that fund equals the maximum rate of ten mills on the dollar.

Appeal from Clay District Court.

TUESDAY, APRIL 3.

THE petition contains the following averments:

The plaintiff is the owner of a judgment against the district township of Spencer, in Clay county, which judgment

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was obtained against the school house fund of said district. On 27th day of February, 1875, the school board of said township issued to the plaintiff its order upon the treasurer of said district directing him to pay said judgment from the school house judgment fund. The said order was not paid for want of funds. At the regular meeting of the school board of said township, said board voted a recommendation to the defendants, who are members of the board of supervisors of Clay county, that they levy and collect a tax sufficient to pay said judgment, interest and costs, which recommendation was properly certified. The defendants refused to make the levy as requested, because they had already gone to the limit of their authority by levying ten mills on the dollar on the taxable property of said district township for the year 1875, for the school house fund, in accordance with the recommendation of the school board of said township.

It is asked that a writ of mandamus issue compelling the defendants to levy a sufficient tax to pay said judgment.

There was a demurrer to the petition, the principal ground of which is that the facts stated in the petition show that the defendants have levied a tax for the school house fund of said district for the year 1875, to the extent allowed by law to be levied in any one year.

The demurrer was sustained, exceptions taken, and judgment rendered against the plaintiff for costs. Plaintiff appeals.

Samuel Gonser, for appellants.

L. M. Pemberton, for appellee.

ROTHROCK, J.—It is conceded that the judgment in question was obtained upon warrants against the school house fund, and the only question is, are the defendants required by law to levy a tax for the payment of the judgments, in addition to ten mills on the dollar.

1. ^{limitation} _{upon: school} TAXATION: The Code, Sec. 1780, provides that the amount levied for school house fund shall not exceed ten mills on the dollar on the property of any district.

The Sterling School Furniture Company v. Harvey.

Sec. 1787 provides, "when a judgment has been obtained against a school district the board of directors shall pay off and satisfy the same from the proper fund, by an order on the treasurer; and the district meeting, at the time for voting a tax for the payment of other liabilities of the district, shall provide for the payment of such order or orders." It is claimed that authority is given under this section to levy a tax in addition to the ten mills provided for in section 1780. We think not. It is a fundamental principle, appertaining to the taxing power, that no taxes can be levied without express authority of law. Section 1780 limits the levy for school house fund to ten mills, and section 1787, construed in the light of section 1780, means simply that when the district makes estimates of the necessary amount for the payment of its liabilities it shall provide for the payment of judgment orders, but the whole tax voted for any one fund for the payment of all liabilities must be within the limits for which a levy may be made for that fund.

The nature of the obligation against the district is not changed by being put in the form of a judgment. Section 1787 requires that the judgment shall be paid from the proper fund. The judgment order is, or should be, against the school house fund, and can be paid from no other.

As there is no independent power to levy a judgment tax, and as the levy is expressly limited to ten mills on the dollar, we think the District Court properly sustained the demurrer. This conclusion is supported by the principles announced in *Iowa Railroad Land Company v. Sac County*, 39 Iowa, 124.

AFFIRMED.

The State v. Read.

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THE STATE V. READ.

1. **Criminal Law: evidence: Bastardy.** In an action charging a party with being the father of an illegitimate child, evidence that the complaining witness shared her bed with one who might have been the father of the child is admissible, as tending to affect the credibility of the testimony of the complaining witness.

Appeal from Dubuque District Court.

TUESDAY, APRIL 3.

ONE Elizabeth Dewees filed a complaint against the defendant, charging him with being the father by her of an illegitimate child. On the trial she testified that the defendant was the father of the child, and that she called on him for assistance and he gave her \$25.

The defendant testified that he never had sexual connection with her. He admitted that he paid her \$25, but he said he obtained it for her, at her request, from a friend of hers. The defendant then called as a witness one Mrs. Brown, who testified as follows: "Have known Mrs. Dewees two years; she lived in the same house with me, on Jackson street. Her son, seventeen years old, lived with her." The defendant's counsel then asked the witness the following question: "For six months next prior to Sept. 29, 1874, do you know whether or not Mrs. Dewees and her son occupied the same bed?" The witness answered: "I know they did the most of the winter last winter, and all winter a year ago last winter." To this answer the State objected as incompetent and immaterial, and not responsive to the question, and asked to have the same excluded. The court sustained the objection, and the defendant excepted.

The defendant then asked the witness the following question: "When, if ever, prior to Sept., 1874, did you know of Mrs. Dewees and her son occupying the same bed, and if so, for what length of time?" To this question the State objected as incompetent and immaterial, and the court sustained the objection, and the defendant excepted.

Robinson Bros. & Gifford v. The Merchants' Despatch Transportation Co.

The jury rendered a verdict of guilty, and the defendant appeals.

E. McCeney, for appellant.

D. J. Lenehan and *J. B. Powers*, for appellee.

ADAMS, J.—If the complainant was accustomed, both before and after the child was conceived, to occupy the same bed with a person who might have been the father of the ^{1. CRIMINAL law: evidence:} child, evidence of such fact, we think, was admissible, as tending to affect the credibility of the complainant's testimony.

In excluding such evidence we think that the District Court erred.

REVERSED.

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d109 556

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e115 619

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ROBINSON BROS. & GIFFORD V. THE MERCHANTS' DESPATCH
TRANSPORTATION COMPANY.

1. **Common Carrier**: CONTRACT OF AFFREIGHTMENT: PRINCIPAL AND AGENT. A contract of affreightment made by the consignor for the consignee is binding upon the latter, and in the absence of fraud or mistake he will be conclusively presumed to know its stipulations.
2. ——: ——: VALID IN ANOTHER STATE. If such a contract is valid under the laws of the State where it is made, it will be binding upon the consignee who may be the resident of another State.
3. ——: ——: BILL OF LADING. Where a contract of affreightment is evidenced by a bill of lading which is partly printed and partly written the contract is to be gathered from the whole instrument, and a stipulation that the carrier will transport the merchandise "without transfer, in cars owned and controlled by the company" constitutes a part thereof, a breach of which, occasioning a loss of the goods by fire, does not entitle the carrier to the protection of another stipulation of the bill of lading, that the carrier will not be responsible for such a loss. *SEEVERS, J., dissenting.*
4. ——: ——: DAMAGES. In an action for damages for the loss of goods under such a contract the plaintiff is entitled to interest on their value, at six per cent, from the time when they ought to have been delivered.

Robinson Bros. & Gifford v. The Merchants' Despatch Transportation Co.

Appeal from Linn Circuit Court.

TUESDAY, APRIL 3.

On the 29th day of September, 1871, D. G. Rawson & Co. delivered to the defendant at Worcester, Mass., for shipment, six cases of boots consigned to the plaintiffs at Cedar Rapids, Iowa. A bill of lading, or shipping contract, was delivered by the agent of defendant to Rawson & Co., of which the following is a copy:

MERCHANTS' DESPATCH TRANSPORTATION COMPANY. Fast freight line from New York, Boston, Albany, and all New England points, to the west, northwest and southwest, through without transfer, in cars owned and controlled by the Company.

New York Office, 365 & 367 Broadway, H. W. Carr, Agent; Boston Office, 17 Court Street, Otis Kimball, Agent; Albany Office 705 Broadway, J. W. Skinner, Agent.

J. FARNSWORTH, Ass't Sup't, Cleveland, Ohio.	J. CHITTENDEN, Supt., 365 and 367 Broadway, New York.
SAM'L FINLAY, Ass't Sup't, 17 Court Street, Boston.	

H. P. NICHOLS, Agent,
Worcester, Mass.

Contents and Value of
Packages Unknown.

MARKS.

Robinson, Bros. & Gifford,
Cedar Rapids, Iowa.

No. 8839 to 8844.

Merchants' Despatch.

The name of the consignee and destination of all freight must be plainly and distinctly marked; and in no case will damage be allowed for wrong delivery or loss caused by defective marking, with initials, or where the marks or directions on packages are made on paper or cards.

WORCESTER, MASS., September 29th, 1871.

Received of D. G. Rawson & Co., in apparent good order (except as noted), the following packages, marked as in the margin, viz:

Six (6) Cases.

To be forwarded in like good order (dangers of navigation, collisions and fire, and loss occasioned by mob, riot, insurrection or rebellion, and all dangers incident to Railroad Transportation excepted), to Cedar Rapids, Iowa, Depot only, he or they paying freight and charges for the same, as below:
If 1st Class, \$1.35 cts. per 100 lbs.

Charges advanced at Worcester, \$ Weight subject to correction.

Subject to the terms and Classification as below, and to difference in Classifications adopted by Western Roads, and to the Government Tax. For the Company.

H. P. NICHOLS, Agent.

The plaintiffs allege in their petition, and amended petition, a non-performance of the contract by failing to deliver the goods, and that the bill of lading was not made at the time the goods were delivered to defendant, but was subsequently delivered to plaintiff's consignors, and that they without

Robinson Bros. & Gifford v. The Merchants' Despatch Transportation Co.

examination, excepting to note the correctness of the description of the boxes and address, transmitted the bill of lading to the plaintiffs by mail, and that neither the plaintiffs nor the consignors knew of the limitation of the contract as to loss by fire till after they learned defendant claimed exemption from liability by reason thereof. Judgment is asked against defendant, for the value of the goods and interest.

The answer admits that defendant received from D. G. Rawson & Co. certain merchandise to be transported to Cedar Rapids, in pursuance of the contract set up in the petition, and avers that said merchandise was destroyed by fire on the 8th and 9th days of October, 1871, at the city of Chicago, without fault on the part of defendant.

There was trial by the court and judgment for the plaintiffs, for the value of the goods and interest. Defendant appeals.

West & Eastman, for appellants.

R. H. Gillmore, for appellee.

ROTHROCK, J.—I. A question is made as to the time at which the bill of lading was delivered to Rawson & Co. The actual delivery of the goods was made by one Henry, the drayman of Rawson & Co. He testifies that he asked for a bill of lading and it was delivered to him. We must assume from this that it was delivered at the time of the delivery of the goods to the defendant; and a delivery to the drayman of Rawson & Co. was equivalent to a delivery to them.

II. The plaintiffs further insist that the limitation in the contract as to loss by fire was not known to them at the time of shipment. This was a transaction done in the ordinary and usual course of business. Rawson & Co. undertook to ship the goods in question to plaintiffs, at plaintiffs' request. Whatever contract of shipment Rawson & Co. made is binding on the plaintiffs, and the plaintiffs cannot avoid it by showing that Rawson & Co. received and forwarded it without examination. In the absence of fraud or mistake the shipper will be conclusively presumed to know the stipulations contained in

1. COMMON
carrier: con-
tract of af-
freightment:
principal and
agent.

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a contract of affreightment. He cannot be permitted to show that he was ignorant of its contents. *Mulligan v. Ill. Cent. Railway*, 36 Iowa, 181, and cases there cited.

III. This contract of shipment was made in the State of Massachusetts, and it is conceded by counsel for plaintiffs ² : that the limitation of defendant's liability as a ^{valid in another state.} common carrier could lawfully be made, and is binding, provided it be held to be the contract of plaintiffs, entered into at the time of the delivery of the goods. As we hold that it was a valid contract, binding on the plaintiffs, the remaining question in the case is as to the defendant's liability for the loss of the goods, by reason of alleged negligence or breach of the contract.

The evidence in the case shows that the goods in question were delivered to the defendant on the 29th day of September, for immediate shipment. The shipment was made by way of Albany, New York, from which last named place they were shipped to Chicago, on the 3rd day of October. They arrived in Chicago on Saturday, the 7th of October, at 7:50 p. m., and were unloaded into the Despatch Freight House of the Michigan Central Railway Co., and on Sunday night, October 8th, the said freight house and its contents, including the goods in question, were wholly consumed by fire.

It will not be claimed that the limitation in the contract exempting the defendant from loss by fire is an exemption ³ : at all events. It was the defendant's duty to ^{bill of lading.} properly perform the other conditions and stipulations of the contract, and if by reason of failure in this respect the goods were lost, even by fire, the defendant would be liable. For example, if it had been stipulated in the contract that the goods were to be shipped by a certain route, and they were shipped by another route, and destroyed by fire while *in transitu*, the defendant would be liable for the loss unless it could show that the loss must have occurred from the same cause if the goods had been shipped by the route designated in the contract.

This contract, we take it, was all on one piece of paper, and the evidence shows it was partly printed and partly written.

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There is nothing in the language contained in the paper indicating that any part of the instrument is not to be considered as part of the contract. An examination of it, as contained in the foregoing statement of facts, will show that the defendant undertook to ship through "*without transfer, in cars owned and controlled by the company.*" It may be said that this is a mere caption to the paper in the nature of an advertisement. It cannot be so regarded. There is nothing in the paper itself indicating that it was so intended, and without the first paragraph there would be no obligation binding on the defendant, unless it could be supplied by extrinsic evidence. There is no other statement made as to what company made the contract, than that contained in the first line. The words "Merchants' Despatch," on the left margin, standing alone, as they do, indicate nothing. We think a fair construction of this contract is that the Merchants' Despatch Transportation Company, a fast freight line from New York, Boston, Albany, and all New England points, to the west, northwest and southwest, shipping through without transfer, in cars owned and controlled by the company, received of D. G. Rawson & Co. six cases, to be forwarded to Cedar Rapids, Iowa. We regard this as an undertaking that these goods should be shipped through without transfer. It does not clearly appear, from the evidence, that the goods were transferred at Albany, and yet we think it is a fair inference, from the fact that a way-bill was made out at that place. It is conceded that there was a transfer at Chicago into a warehouse, where the goods were destroyed. Under the stipulations of this contract there was no right of transfer, and the fact that defendant placed the goods where it had no right to place them under the contract, and the further fact that they were destroyed while in the warehouse, at the very least, puts upon the defendant the burden of showing that the loss would have occurred from the same cause if the goods had remained in the car. No such showing is made in the case.

In *Magee v. The Camden & Amboy R. R. Co.*, 45 N. Y., it is held, "that when a carrier accepts goods to be carried, with a direction on the part of the owner to carry them in a

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particular way, or by a specified route, he is bound to obey such directions, and if he attempts to perform his contract in a manner different from his undertaking he becomes an insurer and cannot avail himself of any exceptions in the contract. If it could be shown, in such case, that the loss must certainly have occurred from the same cause, and if there had been no default, misconduct or deviation, the carrier would be excused, but the burden of proof of this fact would be upon the carrier." See, also, *Davis v. Garrett*, 6 Bingham, 212; *Danuth v. Wade*, 2 Scam., 285; Story on Bailments, Sec. 509, and *Hunting v. Pepper*, 11 Pick., 41.

In *Davis v. Garrett, supra*, it is said that "no wrong doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done."

It must be remembered that we are not now determining the question as to whether the defendant would have been liable for negligence, in the absence of any breach of the express terms of the contract. The question before us is, what are the rights of the parties where the carrier violates the terms of the contract in the mode of transportation.

The construction we place upon this contract is consistent with the general business and undertakings of companies of this character. They are organized as fast freight lines, and supposed to be doing their business over the railways of the country with speed and dispatch, and if transfers be made at connecting points this mode of shipment can have no preference over shipments by the ordinary railway carriage. We can readily perceive, at least, that one great object in the shipper using a fast freight line would be to avoid transfers and the delay and dangers incident thereto.

IV. A question is made as to the allowance of interest on

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the value of the goods. The plaintiffs are entitled to interest
4. — : — : at 6 per cent per annum, from the time the goods
damages. should have been delivered at Cedar Rapids. *Mote*
v. Chicago & N. W. R. Co., 27 Iowa, 22.

We are unable to determine from the abstract the date of the judgment in the court below, but presume that interest was calculated allowing a reasonable time for shipment between Chicago and Cedar Rapids.

AFFIRMED.

ADAMS, J., took no part in the determination of the case.

SEEVERS, J., *dissenting*.—It is held by the majority of the court that the caption or matter preceding the receipt or contract forms a part of the latter. The reason given for this holding is that it requires a reference to such caption to determine by whom the contract was made. This in my judgment constitutes no reason for this holding, much less a sufficient one. There are several (or at least such may be the case) of these freighting companies, and it may be supposed the contract was executed by the "Union Company," and if such were the case, what company I ask would be bound thereby? Clearly the defendant would not; but the company whose agent signed the contract alone would be, and, if necessary, evidence outside of the caption and contradictory thereto could be introduced for the purpose of identifying the company by whom the contract was executed.

Supposing then that the Union Company was identified and shown to be the company by whom the contract was executed, will it be claimed that as to it the caption constitutes a part of such contract, if so, why, or for what reason, and if it does not, why as to the defendant. These, to my mind, are pertinent inquiries.

The caption is complete and has no reference to the contract, nor the latter to it. At most, it may be said to be an advertisement or inducement offered to shippers. But as the plaintiffs do not aver or show that they had knowledge thereof and relied thereon at the time of making the contract, it is

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unnecessary to consider what would be the effect if such were the case.

The opinion holds, as a matter of law, that the unloading the goods at Chicago and placing them in a warehouse constitutes a breach of the contract. What is meant by "through without transfer?" To transfer, according to Webster, means to remove from one place to another. Evidently this was not the meaning contemplated by the parties, if so the goods never could have left the State of Massachusetts. It is well known and understood there are several distinct railroads between Worcester, Massachusetts, and Cedar Rapids, Iowa, over which the goods had to pass, and it is the transfer from the terminus of one road or depot to another that is referred to. In some places this transfer is made with wagons or drays. In others, by means of switches or side tracks, cars loaded with goods are transferred from one road to another. Can it be said as a matter of law the goods in question could not without a breach of the contract be unloaded and placed temporarily in a warehouse, and then reloaded in cars owned by the defendant and transferred from one road to another. If the caption be a part of the contract it must have a reasonable construction, and therefore it cannot be said to prohibit a transfer from one car to another. It may be that among shippers the word transfer, through usage or custom, has acquired a meaning which will warrant the construction placed thereon by the majority of the court. If so, such custom should have been averred and proved. But I strenuously object that the law attaches any such meaning thereto. I am, therefore, compelled to dissent from the foregoing opinion.

Cattell v. Lowry.

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111 380
45 478
114 408

CATTELL V. LOWRY ET AL.

1. **Election: FORM OF BALLOT: TAXATION.** When the question of voting a tax in aid of a railway company was submitted to the voters of a township and the trustees prescribed that the ballots should have written upon them the words "For Taxation" or "Against Taxation" and certain electors cast ballots bearing the words "Against taxation for the benefit of railroad companies or any other monopolies to the indebtedness of the poor man;" *held*, that such ballots should be counted the same as if they were in the form prescribed by the trustees.
2. **Injunction: TAXATION.** A court of equity has jurisdiction to restrain by injunction the collection of a tax which has been certified by mistake by the clerk to have been voted, when in fact the proposition for the levy of the tax was defeated.

Appeal from Polk Circuit Court.

TUESDAY, APRIL 3.

THE plaintiff is a resident property owner and taxpayer of Lee township, Polk county, Iowa. The defendant, Lowry, is treasurer of said Polk county. On the 23d of September, 1871, an election was held in said Lee township for the purpose of voting upon the question as to whether a tax of two per cent should be levied upon the taxable property of the township to aid in the construction of the Des Moines & Minnesota Railroad. The proposition submitted was in the following words:

"We, the undersigned, trustees of Lee township, in the county of Polk, in the State of Iowa, having been petitioned to do so by more than one-third of the resident taxpayers of said township, do, in pursuance thereof and of "An act to enable townships and incorporated towns and cities to aid in the construction of railroads," approved April 12, 1870, herein give notice to the legal voters of said township that there will be a special election held at Wm. Mathews' office, in Lee township, Polk county, Iowa, on the twenty-third (23) day of September, 1871, for the purpose of submitting to the legal voters of said township the question whether or not they shall aid in the construction of a railroad from the city of Des

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Moines to Chickasaw station, on the Milwaukee & St. Paul Railroad, *via* Ames and Ackley (known as the Des Moines & Minnesota Railroad), by levying a tax of two per cent on the taxable property in said township, the same to be expended in the townships of Lee, Saylor, Crocker, Lincoln and Madison, in said county of Polk. Said tax, if voted, to be upon the express condition that the Des Moines & Minnesota Railroad Company shall consolidate with the Nashua & Milwaukee Railroad Company and make said road a part of the Des Moines & Milwaukee Railroad.

"The above question shall be submitted at said election in the following form: 'Taxation or no taxation.' Those voting in favor of said proposition shall have written or printed on their tickets the words, 'For Taxation,' and those voting against said proposition shall have written or printed on their tickets the words, 'Against Taxation.'"

Three hundred votes were cast in favor of the proposition and fifteen votes were cast against it. In addition, two hundred and ninety-four ballots were cast upon which were the following words:

"AGAINST TAXATION."

For the benefit of Railroad Companies, or any
other monopolies. To the indebtedness of the
poor man.

The township trustees, as judges of the election, caused to be entered in the poll book of Lee township the following: "For taxation (here follows marks and tallies to the number of 300), total, 300. Against taxation (here follows marks and tallies to the number of 309), total against taxation, 309." Afterwards they caused entries to be made showing the precise character of the ballots cast and the number of each. Thereupon the township clerk made and delivered to the county auditor a certificate, which is in the following words:

"To J. B. MILLER, *County Auditor*:

"I do certify that two per cent tax was voted on the taxable property of Lee township, Polk county, Iowa, at a special election held in Lee township, September 23, 1871.

"W. MATHEWS, *Township Clerk*."

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The board of supervisors having levied the said tax, and the county treasurer being about to collect the same, the plaintiff applied for and obtained an injunction against the collection of the tax and, upon hearing, the injunction was made perpetual. The defendants appeal.

Barcroft, Given & Drabelle, for appellants.

McHenry & Bowen and Nourse & Kauffman, for appellee.

ADAMS, J.—I. It is claimed by the appellants that the ballots containing the words "against taxation for the benefit 1. ^{ELECTION:} of railroad companies or any other monopolies to form of ballot: taxation. the indebtedness of the poor man," cannot properly be counted at all. It is said that they are not votes upon the question submitted. The presumption, however, is that the voters intended to vote, and we must give the ballots cast such construction as to make them valid votes if they are reasonably susceptible of it. The words used may involve an ambiguity, but they are by no means destitute of meaning. The ballot cast is either a qualified vote or it is an absolute vote with an argument expressed upon the ballot in favor of such vote. It means either that the voter is against taxation for the benefit of railroad companies (including the one in question) or any other monopolies *if it is to result* to the indebtedness of the poor man; or else it means he is against taxation upon the proposition submitted inasmuch as he is against taxation for the benefit of railroads or any other monopolies because it results in indebtedness of the poor man. It is hardly to be supposed that those who cast the ballots in question intended to cast qualified or conditional votes. It must have occurred to them that there was no practical way of determining whether the taxation would or would not result in the indebtedness of the poor man; and it is not probable that they supposed that any such inquiry was to be instituted and determined in favor of the railroad company as a condition precedent to the levy of the tax. We must think, then, that all the words on the ballot after the words "against taxation" are appended by way of argument. It is contended

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by the counsel for appellants that this cannot be so, because the words do not amount to a distinct proposition. But that is unnecessary. An opprobrious epithet is often used as an elliptical form of an argument. Regarding all the words as such upon the ballots after the words "against taxation" we cannot say that they should not be counted as votes. While the practice of writing or printing arguments upon ballots is not to be commended we know of no law which prohibits it.

II. But it is said that the levy of the tax is a judicial act, and that the plaintiff's remedy is not by injunction but by ^{2. INJUNC-} ~~TION: taxa-~~ *certiorari*. The error complained of, however, it will be observed does not inhere strictly in the levy. The error was in the making of the certificate by the township clerk to the auditor. The certificate having been made the levy followed as a matter of course. The provision of the statute (Chap. 102, Laws of Thirteenth Gen. Assembly), is "that if a majority of the votes polled be for taxation then and in that case the township clerk or clerk of said election shall forthwith certify to the county auditor the rate per centum of the tax thus voted by said township. The board of supervisors shall, at the time of levying the ordinary taxes next following said special election, levy all taxes voted under the provisions of this act and cause the same to be placed on the tax list of the proper township." As will be seen it is made their duty to levy the tax upon the receipt by the county auditor of the township clerk's certificate certifying the per centum voted, and that duty is imperative. They are not made the judges of the election and are not supposed to have any records upon that subject except the township clerk's certificate. If a writ of *certiorari* should issue they could in return thereto only certify their proceedings and the township clerk's certificate which would not show the error complained of. The judges of the election are the township trustees, but they have committed no error, for it appears from the poll books that they virtually declared the tax not carried. No writ of *certiorari*, therefore, could issue as against them. It could not be granted against the clerk, for he is not an officer exercising judicial functions.

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This case is simply this: the tax was not voted; the judges of the election virtually so declared; their clerk, by mistake (as we will assume rather than by fraud), certified that it was voted; the levy was occasioned by this mistake. To our mind a court of equity has jurisdiction to restrain the collection of the tax by injunction and declare the levy void. *Zorger v. Township of Rapids*, 36 Iowa, 175. The decree of the Circuit Court is

AFFIRMED.

THE STATE v. WAGNER ET AL.

1. **Highways: AUTHORITY OF AUDITOR.** The county auditor is not authorized to establish a highway of less than sixty-six feet in width, the power to establish such an one being vested in the board of supervisors alone, who may exercise it for good and sufficient reason.
2. _____: _____: **BOARD OF SUPERVISORS.** The auditor having illegally established a highway forty feet wide, the board of supervisors has jurisdiction to vacate the same.

Appeal from Clinton District Court.

WEDNESDAY, APRIL 4.

THE petition states that the defendant, Wagner, is county auditor, and the other defendants are members of the board of supervisors, township clerk, and supervisor of highways; that a petition was presented to the board of supervisors asking the establishment of a highway of the width of forty feet; that a commissioner was appointed to view and report upon the expediency of said highway, who made a report recommending the establishment of the same in accordance with the petition, a day was fixed for the final hearing and the notices provided by law duly served.

On the day thus fixed, there having been no objection to the highway or claim for damages filed, the auditor proceeded to and did establish said highway, and notified the township

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clerk thereof; that the said clerk ordered the supervisor of highways to have the same opened and worked; that afterwards, and on the 7th day of December, 1875, being the next day, objections were filed to the establishment of said highway and also a claim for damages.

On the 3d day of April, 1876, a petition was filed asking the board of supervisors to vacate the order establishing the highway, and on the 6th day of said month the board, without notice to the petitioners, made an order vacating the action of the auditor, and thereupon said auditor notified the township clerk and supervisor of highways not to open and work said highway.

It is claimed the board had no power or jurisdiction to make said order, and that what was done in this respect is a nullity. A writ of mandamus is asked, commanding defendants to have said highway opened and worked according to law. A demurrer to the petition having been sustained the plaintiff appeals.

L. A. Ellis and K. W. Wheeler, for appellant.

Merrill & Howat, for appellees.

SEEVERS, J.—I. It is urged that the auditor had no power to establish a highway of a less width than sixty-six feet, and this first demands our attention.

Without doubt it is true highways can only be established, vacated or changed in accordance with the provisions of law enacted by the General Assembly.

The several officers or boards possess the power or authority vested in them respectively by statute and none other.

It is provided by Sec. 921 of the Code that "highways hereafter established must be sixty-six feet in width unless otherwise directed, but the board of supervisors may for good reasons fix a different width not less than forty feet, and they may be increased or diminished within the limits aforesaid, altered in direction or discontinued by pursuing substantially the steps herein prescribed for opening a new highway."

It will be observed that all highways must be sixty-six feet,

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unless it is otherwise directed. Who then may so direct. Certainly none other than the board or officer upon whom such power is conferred.

It is very clear the board of supervisors may for good reasons establish a highway of any width between forty and sixty-six feet, as such power is expressly conferred. But we look in vain for any such power vested in the auditor.

It is, however, urged that the petition asked the establishment of a road only forty in width, and the commissioner having reported in favor thereof, and the auditor having established the highway, it must be presumed such a width is all that was required. This, however, is not satisfactory, because, 1. The petitioners have no right to ask for the establishment of a highway of any particular width. Code, Sec. 922. Their having done so makes that much of the petition surplusage. Besides this, it is not for them to determine what is sufficient for the public in this respect. 2. The Code does not give the commissioner any power to determine what width the highway shall be. His power is exhausted when he reports for or against the highway, so far as the present question is concerned; and 3. The fact that the auditor has so directed by no means demonstrates his power in the premises. The words "unless otherwise directed," as used in the Code, must of necessity mean that the direction shall be given by some competent authority. Section 937 of the Code authorizes the auditor in certain contingencies to establish highways, but nothing is said as to the width. Now suppose the petition, as it should have done, had simply asked the establishment of a highway on a certain defined route, and the commissioner had reported in favor of the same; will it be claimed that under this section the auditor could fix the width at forty feet and establish the highway? We are clear he could not legally have so done. If he could not in the supposed case, he could not in the one at bar for want of power.

II. But conceding the auditor acted illegally, had the board of supervisors the power and authority to set aside his order?
^{2. —: —:} The Code provides: "The board of supervisors has _{board of su-} the general supervision over the highways in the

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county, with power to establish and change them as herein provided, and to see that the laws in relation to them are carried into effect." Sec. 920. Having held that there was no law authorizing the auditor to establish the highway in question, we think the foregoing section conferred ample power on the board to set aside his action as a thing which had not been done according to law.

It was the duty of the board to see that the laws in relation to highways were carried into effect, and the same established or vacated in accordance therewith, and this could only be done by setting aside the action of the auditor, and for themselves determining as an original question whether the highway in question should be only forty feet in width. The section under consideration is about as broad as the statute under which *Brooks v. Payne*, 38 Iowa, 263, was determined. The language is different, but the meaning must be held to be the same.

The auditor having no power to establish highways of a less width than sixty-six feet, and as his jurisdiction over the subject matter only attached upon the happening of certain contingencies, his action was void, and *Knowles v. Muscatine*, 20 Iowa, 248, does not apply.

In fact, the auditor has no original jurisdiction over highways, but if no objections are made to the establishment of a particular highway, and no damages are asked, he may establish such highway. But the law interposed an objection to his establishing the road in question. He should have heeded it, and none other was required.

AFFIRMED.

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45	486
79	719
45	486
84	476
45	486
93	517
45	486
97	498
45	486
117	228
45	486
118	669
45	486
126	251

THE STATE v. ELLIOTT.

1. **Criminal Law:** PRACTICE: JURY. Where a challenge to a juror for cause was overruled, and the defendant who had not exhausted his peremptory challenges failed to challenge the juror peremptorily, the ruling of the court upon the challenge for cause, if erroneous, was error without prejudice.
2. ——: EVIDENCE: DYING DECLARATIONS. It is the province of the court to determine the competency of what are offered as dying declarations, but evidence tending to show whether or not the testimony offered is of the character it purports to be is admissible for the enlightenment of the court.
3. ——: ——. Proof that the deceased was a materialist could not be received to affect the admissibility of his dying declarations.
4. ——: ——: ——. Such proof, however, is competent for the purpose of assailing the credibility of the witness and lessening the weight of his dying declarations.
5. ——: ——: AFFIDAVIT. An affidavit not in the language given by the deceased to the party who drew it, and not read over to him after being written out, is not admissible.
6. ——: ——: THREATS. Evidence of threats made by deceased against the defendant and not communicated to him, is not admissible. To this rule the only exception occurs where violent threats are made by the deceased a short time before the occurrence, and the question arises whether or not the defendant perpetrated the act in self-defense.

Appeal from Dallas District Court.

WEDNESDAY, APRIL 4.

THE defendant was indicted for the murder of John W. Bold, was tried, convicted of murder in the second degree, and sentenced to the penitentiary for twelve years. He appeals. The material facts appear in the opinion.

E. Willard, R. B. Parrott and T. R. North, for the appellant.

M. E. Cutts, Attorney General, for the State.

DAY, CH. J.—I. Three persons called as jurors, Slaughter, Chance and Wright, were, upon their examination as to their

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qualifications as jurors, challenged for cause by the defendant.

1. CRIMINAL law; practice: The challenge was overruled. The abstract shows that Slaughter and Chance were challenged peremptorily. The abstract does not show that Wright was so challenged, and it does not appear whether or not he served upon the jury, but the jury was accepted by the defendant without exhausting the peremptory challenges to which he was entitled. If, then, Wright was allowed to serve upon the jury, it was by the defendant's voluntary act. If the ruling of the court in overruling the challenges for cause was error, it was error without prejudice. If defendant had exhausted all his peremptory challenges a very different question would be presented. *State v. Davis*, 41 Iowa, 311.

II. No person was present at the time the wound was inflicted upon Bold, of which he subsequently died. The 2. ——: evidence: dying declarations. principal evidence against the defendant consists in the dying declarations of deceased. The State introduced T. J. Caldwell, a surgeon who was called to attend Bold. He testified as to his condition and his belief that his dissolution was approaching. He was then asked to state what Bold said in regard to who shot him, or who inflicted the wound on him. The defendant objected, and then offered to prove to the court by competent testimony that at the time of making the declaration the deceased did not believe that he was about to die, but expected to recover from the wound; and the defendant asked the court to be permitted, at this stage of the proceeding, to introduce his evidence touching the matters made in his offer, for the purpose of testing the competency of the declarations of deceased. The court refused to admit this testimony, and permitted the declarations of deceased to be introduced. In this action we think the court erred. It is the province of the court to determine the competency of the declaration offered. In Greenleaf on Evidence, section 160, it is said: "The circumstances under which the declarations were made are to be shown to the judge; it being his province, and not that of the jury, to determine whether they are admissible." The cases uniformly hold that the competency of such testimony is to be determined by the

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judge, in view of all the surrounding and attendant circumstances. *McDaniel v. The State*, 8 S. & M. 401; *Hill v. The Commonwealth*, 2 Gratt., 594; *Commonwealth v. Williams*, 2 Ashm., 69; *Rex v. Spilsbury*, 7 C. & P., 187; *Rex v. Bonner*, 6 C. & P., 386; *Rex v. Hucks*, 1 Stark. Rep., 521.

The court does not discharge this duty by simply hearing the evidence produced upon the part of the State. Evidence, if offered, should be received upon the part of the defendant, and it should be weighed upon the determination of the question of admissibility. The declarations of a dying man are admitted on a supposition that in his awful situation, on the confines of a future world, he had no motive to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice. Roscoe's Criminal Evidence, p. 35. Before the judge decides the question of admissibility he hears all the deceased said respecting the danger in which he considered himself, and he should be satisfied that the declaration was made under an impression of almost immediate dissolution. It is not enough that the deceased thinks he shall ultimately never recover. Phillips on Evidence, Cowen & Hill's notes, part 1, page 252. In the same volume it is said, page 253: "We see that competency is a question of fact for the court, as in other cases. They are to find upon it as the jury do upon the main case, taking into view all the circumstances calculated to prove and disprove that despair of life which shall be equivalent to a sworn obligation." And upon page 254, it is said: "Upon this question of fact no rule can be adopted which will reach every variety of detail. The court try the competency of the deceased as the jury do his credibility; and the decision in either case on a conflict of testimony must be final." We are satisfied that the court ought to have inquired into all the circumstances attending the declarations, and to have heard the testimony offered by the defendant, before determining that the declarations were competent, and permitting them to go to the jury.

III. The defendant offered to prove, as affecting the admissibility of the declarations of deceased, that he was a materi-

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alist, and that he believed in no God or future conscious existence. The proposed proof was not competent for the purpose of affecting the admissibility of the dying declarations. If Bold had been alive he would have been a competent witness, although a disbeliever in God and a future state. Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in this State. Code, § 3636.

IV. The defendant, however, when he came to make out his defense, offered to prove the foregoing facts as affecting the credibility of the declarations of deceased, and the evidence was not admitted for this purpose. In this there was error. Under the common law persons insensible to the obligation of an oath from defect of religious sentiment and belief were incompetent to testify as witnesses. The very nature of an oath presupposes that the witness believes in the existence of an Omniscient Supreme Being, the rewarder of truth and avenger of falsehood. Atheists, therefore, and all infidels, that is, all those who profess no religion that can bind their consciences to speak truth, are, at common law, rejected as incompetent to testify. 1 Greenleaf, Sec. 368. Our Code, section 3637, provides: "Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility." If Bold had been offered as a witness it is very clear that the proposed proof would have been competent for the purpose of affecting his credibility.

But dying declarations are open to direct contradiction in the same manner as any other part of the case for the prosecution, and the prisoner is at liberty to prove that the deceased was not of such a character as was likely to be impressed with a religious sense of his approaching dissolution, and that no reliance is to be placed on his dying declarations. Roscoe's Criminal Evidence, p. 35.

V. Against the objection of defendant, the court permitted an affidavit made by John N. Bold, before Lemuel Ward, a justice of the peace, to be offered in evidence. The evidence shows that Bold gave

The State v. Elliott.

Warford the substance of the affidavit, and Warford shaped it. About two-thirds of it is in the language of Bold, and the balance is in the language of Warford. It was not read over to Bold after he signed it. As the statement was neither in the language of deceased nor read over to him before he signed it, we think it was inadmissible.

VI. The court rejected proof offered by defendant tending to show that Bold had poisoned defendant's flour, attempting thereby to poison defendant and his family. We think there was no error in rejecting this testimony.

VII. The court refused to permit defendant to prove acts and conduct of defendant showing that he was very much afraid of Bold, and sought to get away from and avoid him. There was no error in this ruling.

VIII. Evidence of threats made by deceased against the defendant, but not communicated to defendant, was rejected.

6. —: —: There was proof of threats, however, which were threats. communicated, which brings the case fully within the principle of *State v. Woodson*, 41 Iowa, 424, and renders the ruling, if erroneous, error without prejudice. But as the question will probably arise upon the re-trial we deem it proper to determine it now. The decided weight of authority holds that threats uncommunicated are inadmissible. See *Com. v. Frengan*, 44 Penn., 586; *Newcomb v. State*, 37 Miss., 383; *Powell v. State*, 19 Ala., 577; *Coker v. State*, 20 Ark., 53; *Atkins v. State*, 16 Ark., 568; *Gingo v. State*, 29 Geo., 470; *State v. Dumphrey*, 4 Minn., 438; *State v. Gregor*, 21 La. Ann., 473; *State v. Jackson*, 17 Miss., 544.

The only exception to the rule seems to be that, where evidence had been given making it a question whether the defendant had perpetrated the act in defense of his person against an attempt to murder him, or inflict some great bodily harm upon him, violent threats made by deceased against the defendant a short time before the occurrence may be proved, though not communicated. *Stokes v. The People*, 53 N. Y., 164. The threats offered to be proved in this case do not fall within this principle. We think they were properly rejected.

Fargo & Co. v. Ames.

IX. The defendant asked fifty-three instructions, all of which were refused. The court gave thirty-five instructions. Many objections are urged to the instructions given, and to the refusal to give those asked. It would extend this opinion to an undesirable length were we to take up and consider *seriatim* all these objections. The charge of the court is very full, clear and explicit, and, taken together, very fairly presents the law of the case. If any portion of it fails to sufficiently qualify or extend the doctrines presented, it is likely that the learned judge who tried the case will himself make the proper corrections upon the re-trial.

For the errors discussed the judgment is

REVERSED.

FARGO & CO. V. AMES ET UX.

1. **Partnership: LIABILITY OF PROPERTY FOR FIRM DEBTS: ATTACHMENT.** An attachment of partnership property for a partnership debt will prevail over a prior attachment of the same property for a separate debt of one of the partners, or over a mortgage of one of the partners to secure his individual indebtedness.

2. **—: MORTGAGE BY PARTNER.** A mortgage upon the firm property by a partner to secure his separate debt covers the entire joint property, subject to the claims of his co-partners therein, and if he secures the release of these claims the lien of the mortgage becomes absolute upon the whole property.

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Appeal from Black Hawk Circuit Court.

WEDNESDAY, APRIL 4.

THE defendant, D. B. Ames, formed a co-partnership with one Lawson for the manufacture and sale of boots and shoes, which co-partnership continued for a few months. While it was in existence the defendant, D. B. Ames, executed to his wife, the defendant, Marion Ames, a mortgage upon the firm stock to secure an individual debt due from him to her. The plaintiffs are creditors of the firm. The defendant, Marion

Fargo & Co. v. Ames.

Ames, has taken possession of the stock under the mortgage. The plaintiffs seek to reach the stock by garnishing her. Issue having been taken upon her answer, the case was tried to the court, and judgment rendered establishing her said mortgage as paramount to plaintiffs' lien by attachment. Plaintiffs appeal.

Boies, Allen & Couch, for appellants.

J. L. Husted, for appellees.

ADAMS, J.—An attachment of partnership property for a partnership debt will prevail over a prior attachment of the

same property for a separate debt of one of the partners. *Pierce v. Jackson*, 6 Mass., 242. So doubtless an attachment of partnership property for a partnership debt will prevail over a mortgage executed upon the same property by one of the partners to secure his separate debt. In this case, however, it is claimed that at the time of plaintiffs' attachment the property had ceased to be firm property and had become the private property of the defendant, D. B. Ames, the said Marion Ames' mortgagor. On this point the evidence is far from satisfactory, and the Circuit Court made no finding of fact expressly in relation thereto. Lawson testifies, in substance, that he sold his interest in the stock to his co-partner, Ames; but, taking his statements altogether, we are left in great doubt. Ames, although called as a witness, testifies to nothing upon the point. But, meager and unsatisfactory as the evidence is, we are of the opinion that if the Circuit Court had found the fact of such sale we should not be justified in setting the finding aside. The Circuit Court did not find expressly either that the sale was made or that it was not made. It found other facts but omitted this. No exception was taken to a lack of finding upon this point. No request appears to have been made to find specifically upon this point. The conclusion of law reached by the court is such as to show that the court must have found in its own mind that such

1. PARTNER-
SHIP: liabil-
ity of proper-
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debts: at-
tachment.

Fargo & Co. v. Ames.

sale was made; and in the state of the record we feel bound to take such to be the fact.

It is claimed, however, by the appellants, that conceding such to be the fact the said Marion Ames' mortgage would 2. ——: mort- not cover the interest thus sold. Their argument, gage by part- her. in substance, is this: Her mortgage, at most, at the time it was executed, covered only such residuum of interest as would belong to her mortgagor upon a full settlement of the partnership affairs. If afterwards the mortgagor acquired a greater interest it could not pass by the mortgage already executed. This position we do not think can be sustained. The mortgage purported to cover the entire stock, and in one sense we may say that it did so in fact. Each partner may be regarded as the owner of the stock, subject to the claim of his co-partner therein. If either partner secures the release of his co-partner's claims, the stock ceases to be firm property and the title becomes absolute in the partner who has secured such release.

Again, it is conceded that the mortgage conveyed whatever interest would belong to the mortgagor upon dissolution and settlement of the partnership. If any sale was made it was the result of such dissolution and settlement. It was what remained to him after Lawson had been settled with and paid off. We think that the judgment of the Circuit Court must be

AFFIRMED.

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FARGO & CO. ET AL V. AMES ET AL.

1. **Injunction: Pleading: Matter in avoidance.** Where the equity of the petition is admitted or not denied and the answer sets up new matter in avoidance, or contains matter which amounts to a defense, such answer is not equivalent to a denial of plaintiffs' equities and the injunction should be continued to final hearing.
2. — : — : **Questions of doubt.** Where it is apparent from the answer that there are still questions of doubt respecting which additional information is indispensable to a decision of the case, a dissolution should not be granted, especially when the relief was asked for the prevention of irreparable injury.

Appeal from Black Hawk Circuit Court.

WEDNESDAY, APRIL 4.

THE petition states that the plaintiff, William Lawson, on the 3d day of May, 1875, and the defendant, D. B. Ames, entered into partnership in the business of manufacturing, purchasing and selling boots and shoes; that Ames was to contribute five hundred dollars to the capital stock, and both partners were to devote their time and attention to the business, the profits of which were to be divided equally and the losses borne in the same proportion; that the business was continued until January 7, 1876, and a large indebtedness incurred, which is due and unpaid; that on the 15th day of November, 1875, the said D. B. Ames executed to the defendant, Marion Ames, a chattel mortgage on the partnership property for one thousand dollars to secure the payment of the individual debt of D. B. Ames, who is insolvent, and that Marion Ames, at the time said mortgage was executed and delivered, well knew the property mortgaged belonged to the partnership and that it constituted the entire and only assets of the firm.

That on the 31st day of January, 1876, Marion Ames, through the defendant, Hayzlet, her agent, took possession of said property under and by virtue of the mortgage, and is about to sell the same and appropriate the proceeds to the

Fargo & Co. v. Ames.

payment of said mortgage. The other plaintiffs are creditors of the partnership, and state that both the partners are insolvent and there is no property or assets from which their debts can be realized except the mortgaged property. It is asked that an accounting be had between the members of the firm—the extent of the debts ascertained, that an injunction be granted restraining the sale of said property, and that the same be sold under the decree and direction of the court and the proceeds applied to the satisfaction of the partnership debts. An injunction was granted.

The answer admitted the partnership as stated in the petition, but denied each and every other allegation, except that the mortgage was given to secure the individual debt of the defendant, D. B. Ames, with reference to which it was stated that the mortgage was given to secure the only capital put into the business by either of the partners, and that said money constituted the basis upon which the firm procured credit and did business, and that Lawson had full knowledge said money belonged to Marion Ames; that the indebtedness of the partnership was created and credit extended thereto solely on the individual liability of D. B. Ames; that on the 7th day of January, 1876, Lawson sold the property and his entire interest in the firm to D. B. Ames, who took full and absolute possession thereof.

There was a motion to dissolve the injunction; the petition being supported by the affidavit of Lawson and the answer by the affidavit of D. B. Ames. This motion was sustained and plaintiffs appeal.

Boies, Allen & Couch, for appellants.

Jas. L. Husted and C. W. Mullan, for appellees.

SEEVERS, J.—The existence of the partnership is expressly averred in the petition, and admitted in the answer. The petition does not state that the firm had been dissolved, or that Lawson had sold his interest therein to D. B. Ames. All that is said on this subject is, that the firm continued to do business until about January 7th, 1876. The answer then

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alleges that Lawson on that day sold his interest in the partnership, and delivered possession of the property to D. B. Ames. This averment is not responsive to the petition but constitutes new matter in avoidance of the allegations thereof. If the defendants, by motion for a more specific statement, had, under the order of the court, compelled the plaintiffs to state whether or not there had been a dissolution, sale and delivery of the goods to Ames, the legal effect of the averment in the answer would have been materially different.

We regard the established rule to be, where the equity of the petition is admitted or not denied, and the answer sets up new matter in avoidance, or contains matter which
1. INJUNC-
TION: plead-
ing: matter
amounts to a defense, such answer is not equiv-
alent to a denial of the plaintiff's equities, and
that the injunction should not be dissolved, but continued to
the hearing. High on Injunctions, Sec. 895; *Shricker v.
Field*, 9 Iowa, 366.

If the firm had never been dissolved, and the business at the time possession was taken of the property under the mortgage was being conducted by the partnership, we think the plaintiffs' right to an injunction for the protection of their interests would be clear.

It, therefore, follows that, by reason of the new matter in the answer, the injunction should not have been dissolved.

It is a matter of doubt whether the preponderance of the evidence is in favor of the defendants, as to the fact whether
2. ---: ---:
questions of
doubt. there had been a dissolution and sale of the prop-
erty by Lawson to D. B. Ames. The learned judge before whom the cause was heard concedes that this question of fact "was left in great doubt, and it would have been much more satisfactory had the question been more clearly established." In this view of the evidence we fully concur. Under such circumstances what is the rule? In High on Injunctions, Sec. 901, it is said, "Where it is apparent from the answer that there are still questions of doubt on which additional light is required, to satisfy the court before deciding the rights of the parties, a dissolution should not be granted, especially where the very purpose for which the relief was

Pearson v. The Milwaukee & St. Paul R. Co.

originally allowed was the prevention of irreparable injury." In accord with this rule the injunction should not have been dissolved.

Without doubt the rule is, where fraud is the gravamen of the petition, or where it is apparent that by the dissolution the plaintiff will lose all benefit which would otherwise accrue to him should he finally succeed in his cause, the court may in the exercise of a sound discretion continue the injunction to a hearing. *High on Injunctions*, Sec. 899; *Stewart et al., v. Johnston & Co.*, 44 Iowa, 435.

We think it quite evident that the effect of the dissolution of the injunction in the present case would be to deprive the plaintiffs of any and all benefit, even should they succeed in making out a case requiring an accounting, and the rendition of a decree for the payment of the partnership creditors from the proceeds of the mortgaged property. In fact no possible object could be subserved by continuing the suit, for long before there could be a final decree the property will have been sold and appropriated to the payment of the mortgage debt. For the reasons stated the order dissolving the injunction must be

REVERSED.

PEARSON v. THE MILWAUKEE & ST. PAUL R. CO.

45	497
79	123
79	409
45	497
89	233
45	497
120	453

- Pleading: CAUSE OF ACTION: STATEMENT OF.** Under the Code the same cause of action may be stated in different counts of the petition, and, while a statement therein that the counts relate to the same cause of action is unnecessary, yet it will not vitiate the pleading.
- Negligence: DOMESTIC ANIMALS RUNNING AT LARGE: RAILROADS.** A railway company is released from the duty of exercising ordinary care toward a domestic animal required to be kept in an inclosure, which may have strayed upon its track, only when the animal is at large by the owner's sufferance.

Appeal from Clayton Circuit Court.

WEDNESDAY, APRIL 4.

Action for damages for killing plaintiff's colt. The petition contains two counts. In the first it is averred, in substance,

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that the colt was killed at Luana station, through the gross and wanton negligence of the defendant, and that the plaintiff was damaged thereby in the sum of three hundred dollars. In the second, it is averred that the colt was killed at a point where the defendant had a right to fence, but had not fenced; that plaintiff had served upon the defendant an affidavit of the killing, and notice of claim of damages, more than thirty days prior to the bringing of the suit, and in said count the plaintiff prayed judgment for four hundred dollars. The petition contains a statement that the two counts relate to one and the same cause of action.

The defendant made a motion for an order that the plaintiff be required to elect on which of the two counts of action he will stand. This motion was overruled. The defendant then answered. Other facts are stated in the opinion. Trial by jury, verdict and judgment for plaintiff. The defendant appeals.

T. Updegraff, for appellant.

S. S. Powers and Stoneman & Chapin, for appellee.

ADAMS, J.—I. The appellant assigns as error the overruling of its motion assailing the petition.

Section 2934 of the Revision required that one cause of action should be expressed in but one statement, and, in case ^{1. PLEADING:} it should be expressed in more than one, and the <sup>cause of action: state-
ment of.</sup> defendant should move to strike out all but one, it would be necessary for the plaintiff to do so, or prove as many causes of action as there were counts, or pay the costs of the whole trial.

To guard against the inconvenience which might sometimes arise, it was provided by section 2936 that a cause of action might be stated in different counts when the plaintiff could not determine which he would be able to prove. Both these sections are omitted from the Code of 1873, and the effect is, we think, to remit parties to the common law rule allowing the same cause of action to be pleaded in different counts.

Pearson v. The Milwaukee & St. Paul R. Co.

If it is stated, as in the petition in this case, that the counts relate to the same cause of action, such statement, while it is unnecessary, will not, we think, vitiate the pleading. Section 2644 of the Code abolishes all technical forms of actions, and fictions. We cannot hold, therefore, that the petition is liable to this objection.

But it is further objected that the petition sets up a cause of action not referred to in the original notice. It would appear from the notice that the damages claimed are those given by statute. The petition shows facts which, if true, would entitle the plaintiff to such damages. It also shows other facts which, if true, would entitle the plaintiff to only such damages as are recoverable at common law. Still, the cause of action, in either case, was the killing of the colt, and we do not think that the objection is well taken.

II. The defendant asked the court to give an instruction in the following words: "If the colt was a stallion nearly three years old it was the owner's duty to keep him up, and if he was killed on defendant's depot or station grounds the plaintiff cannot recover, unless he proves that such colt was killed through the gross and wanton carelessness of the defendant."

This instruction the court refused, and we think properly. The appellant in support of the instruction cites *Alger v. R. R. Co.*, 10 Iowa, 268 (271), and quotes from the opinion the following words: "In those states where the owners of domestic animals are required to keep them within an inclosure, and are not allowed to suffer them to run at large, the courts have ruled that when they are suffered to run at large and happen to stray upon the track of a railroad the servants of the company are released from the duty of exercising ordinary care and the company is liable only for gross negligence or willful injury."

Conceding this to be the rule, and that the animal was such as the plaintiff was prohibited by statute from allowing to run at large, we think that the instruction was properly refused. It ignored the material question upon which the jury should have been called upon to pass, and that is as to whether the

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animal was at large by plaintiff's sufferance. It would not follow that he was from the mere fact that he was at large. This precise point was ruled in *Buckley v. R. R. Co.*, 27 Conn., 479. The case arose under a statute similar to ours. The plaintiff left his cows in front of his house intending to milk them, and they strayed away about a mile to the defendant's railroad and were injured. It was held that the defendant could not escape liability by reason of the statute, if the plaintiff intended to put the cows into an inclosure, and exercised ordinary care for the purpose of keeping them. In the case at bar the evidence tends to show that the colt escaped from the plaintiff's barn the night he was killed, and without any fault on the part of the plaintiff.

III. The appellant claims that the verdict is not sustained by the evidence; and certain instructions, the giving of which is assigned as error, are considered by appellant in his argument with reference to the sufficiency of the evidence. It seems to us by no means certain that the injury was caused by the defendant's fault. But certain circumstances were shown which might be considered as indicating that it was particularly the omission to sound the whistle. What should have been done under the circumstances shown it is difficult to determine. That question, however, was peculiarly for the jury, and while we doubt the correctness of their verdict we do not feel at liberty to disturb it.

AFFIRMED.

Hobart v. Hobart.

HOBAERT v. HOBART.

45	501
99	181
45	501
106	734
45	511
116	730
45	501
126	499

1. **Practice : REFERENCE OF CAUSES.** It is the general rule in this State that all actions may be referred by consent, and chancery cases, wherein questions of fact arise, without consent.
2. ——: DIVORCE: REFEREE. Actions for divorce, however, are excepted from the operation of this rule by section 2222 of the Code, and such actions cannot be sent to a referee for a hearing, but must be publicly tried in open court by the courts themselves.
3. ——: ——: CONSENT OF PARTIES. Consent of the parties to an action for divorce will not authorize the court to refer the case.
4. ——: ——: REFEREE. The fact that the report of the referee is filed with the court, and exceptions thereto are heard and ruled upon, does not constitute a trial in open court within the meaning of the statute.
5. ——: ——: ——. Nor does the adoption of the findings of the referee by the court constitute a compliance with the requirements of the statute.
6. ——: ——: COMMISSIONER. The referee is not merely a commissioner to take the evidence, such as may be appointed under section 2222 of the Code.
7. ——: ——: ——. But, where an action for divorce has been tried by a referee, it was held that the evidence taken before him might be used upon a re-trial of the case.
8. ——: ——: TRIAL DE NOVO. The fact that such an action is triable *de novo* in the Supreme Court, and that all the evidence is before it, in an action which has been tried before a referee, does not obviate the necessity for a reversal and re-trial in the manner provided by statute.

Appeal from Johnson Circuit Court.

WEDNESDAY, APRIL 4.

ACTION for a divorce. Upon motion of plaintiff the cause was sent to a referee. The record shows that the defendant objected to the order of reference, but the order itself recites that it was made upon the agreement of the parties. It also recites that exception was taken thereto by defendant. Objection to the reference and denial of the referee's jurisdiction were renewed before him, and to the court upon the filing of

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the report. The cause was submitted to the Circuit Court upon the referee's report, exception thereto, the pleadings and the evidence taken at the reference. The report was confirmed and a decree entered granting the relief prayed for in the petition. Defendant appeals.

Slater & Edwards, for appellant.

Boal & Jackson, for appellee.

BECK, J.—I. There is apparent and irreconcilable conflict in the record, as presented to us, upon the question of the consent of the parties to the order of reference. The defendant seems to have objected thereto upon all proper occasions. But the order of the court, which shows the action had upon the subject, explicitly recites that the reference was made upon the agreement of the parties. We are bound by this adjudication of the court upon the question of the assent of the parties, rather than by other matters appearing in the record contradictory thereto. We must regard the reference of the case as having been made with the consent of the defendant.

II. We are, in this view of the case, required to determine whether the court, with the consent of the parties, has authority to refer a divorce case. The question depends upon the construction of certain sections of the Code upon the subject of reference of actions and the trial of divorce cases, which we will now proceed to consider.

The provisions controlling the reference of causes generally are found in the following sections of the Code:

“2815. All or any of the issues in an action, whether of fact or of law, may be referred upon consent of the parties, either written or oral, in court, entered upon the record.

“2816. Where the parties do not consent, the court may, upon its own motion, direct a reference in either of the following cases:

“1. * * * * *

“2. * * * * *

“3. Where a question of fact shall arise in any action by equitable proceedings, in which case the court, in the order

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of reference, shall prescribe the manner in which the testimony shall be taken on the trial."

Under these sections all actions may be referred by consent, and chancery cases, wherein questions of fact arise, without consent. It may be conceded that, if no other provision renders these sections inapplicable to divorce cases, they may be referred by consent under the first section just cited, and, being prosecuted by equitable proceedings, they may be referred under the other when issues of fact arise therein. *State v. Orwig*, 25 Iowa, 280.

III. Code, § 2222, authorizing and governing proceedings for divorce, contains the following provision: "No divorce ~~2. ——: di-~~ shall be granted on the testimony of the plaintiff; ~~vorce:referee.~~ and all such actions shall be heard in open court on the testimony of witnesses, or depositions taken as in other equitable actions triable upon oral testimony, or by a commissioner appointed by the court."

The trial required in this section is to be had *in open court*. We are first charged with the task of determining the purport and effect of the words "*open court*." The language is simple and its meaning obvious. The trial must be in a *court*. Blackstone, adopting Coke's definition, says, "a court is a place where justice is judicially administered." 3 Bl. Com., 24. But this definition obviously wants fullness; it is limited to the *place* of a court in its expression. In addition to the place, there must be the presence of the officers constituting the court, the judge or judges certainly, and probably the clerk authorized to record the action of the court; time must be regarded, too, for the officers of a court must be present at the place and at the time appointed by law in order to constitute a court. To give existence to a court, then, its officers and the time and place of holding it must be such as are prescribed by law. The Circuit Court is to be held by the Circuit Judge (Code, Chap. 5, Title III), and its terms are prescribed by law (§ 163). The places of holding it are also prescribed, and it cannot be held elsewhere (§ 192). To constitute the Circuit Court, then, the Circuit Judge must be in

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the discharge of judicial duties at the time and in the place prescribed by law for the sitting of that court.

The word *open*, used in the section before us as an adjective qualifying the noun *court*, is to be understood as conveying the idea in this connection that the court must be in session, organized for the transaction of judicial business. This is its meaning when used elsewhere in the Code. See §§ 2805, 191, 4390, 2741. It may, possibly, in this connection, mean public, free to all. If so, such signification would not materially change the force of the expression, and certainly would not require us to understand the term court to imply anything other than a tribunal organized for the administration of justice at the time and place prescribed by law.

Counsel for plaintiff insists that the sole office of the words "open court" is to secure the trial of divorce cases publicly, to prevent secret proceedings therein by providing that no one shall be refused admittance to the court while such cases are on hearing. While, as we shall hereafter see, such, doubtless, was the legislative intention in enacting the provision, the object is not attained by providing that the trials shall be in *public* courts, but rather that the trials shall be before the *courts* themselves, and not elsewhere or at any other times than the law prescribes for the sessions of courts. It cannot be thought that this provision was introduced to secure public trials when a general statute requires the same thing. Code, § 189.

The trial of divorce cases then must be before the court as we have expressed the meaning of the term. But it is insisted that the referee in this case, when in discharge of his duties, was the court and, therefore, this requirement was complied with. This position is untenable. The referee is not the judge of a court but an officer thereof, acting under appointment and charged with certain special duties. The law confides to him no judicial powers further than they are conferred upon him by the court's appointment. He has no power to hold the court. If, therefore, he discharges the duties intrusted to him at the time and place prescribed by law for holding

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courts, the tribunal cannot be called a court, for it has not a judge.

But it is argued that as § 2819 provides "the referee shall stand in the place of the court, and shall have the same power, so far as necessary, to discharge his duty," the law regards him as the court. The language of this section refutes the proposition. The referee, it is provided, "stands in the place of the court;" that is, he is charged with duties and possesses powers with which the court is clothed. But he is not the court; he simply *stands in its place*. Surely, had it been the intention of the law-makers that the referee should constitute the court, no such language would have been used.

IV. We will next inquire whether the consent of the parties to the reference authorized the court to refer the case. A ~~consent of~~ word in regard to the intention of the legislature in enacting the provisions above discussed will be here pertinent. It was doubtless intended to prevent the fraudulent procurement of divorces, which, if not in our State, has elsewhere been practiced to an extent that has become a public evil. Dissolutions of the marriage contract, it is known, have often been procured clandestinely, without the knowledge of innocent parties unwilling to be divorced. Parties weary of the marriage relations existing between them, or attracted by other "affinities," without any legal cause of divorce have collusively procured separations by the decrees of the courts. These fraudulent proceedings are not only had by the abuse of the powers of the courts, but inflict evil upon society. Our legislature has wisely thrown barriers in the way of those who thus violate the law and condemn good morals and public decency. One of these barriers is the provision in question to the effect that all trials in divorce cases shall be before the *open court*. Secrecy, whereby the innocent spouse may be unwillingly divorced, and collusion, whereby the discontented unlawfully aim to dissolve the marriage relations, are defeated. An interested, sympathetic or incompetent referee cannot be appointed in a quiet way to withdraw from public observation and examine the case in the manner best calculated to attain the object of the fraud

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of the plaintiff or the collusion of the willing defendant. The statute requires such cases to be tried in the light of day, by the judge of the court who, it is presumed, will fairly and fully administer the law. It is one of the provisions which the Commissioners revising the Code in their report say is "designed to prevent the abuse of our divorce laws and especially the obtaining of fraudulent divorces by persons not actually entitled to the benefit of our laws." Report, p. 68. The provision in question was first introduced into the Code, being found in no prior enactment. The legislative intention in its enactment is doubtless expressed by the Code Commissioners. It will be clearly seen that this intention could be readily defeated in cases of collusive applications for divorces, by the agreement of the parties.

The power of the court in actions that are not of purely equitable cognizance, to appoint referees for the trial of such causes rests alone upon legislative enactment. It may be that in cases originally cognizable in chancery such power is possessed. *State v. Orwig*, 25 Iowa, 280. But this inquiry we need not pursue. It must be admitted that, if the statute forbids the reference of cases of a particular class, or requires them to be tried by the court, they cannot be referred, and an order to that effect would be void. The court, by such an order, could not confer authority upon the referee to try the cause. The order would not be valid if made with the consent of the parties for the simple reason that the law forbids the reference—requires the court to try the case itself. This position, we think, cannot be disputed. We conclude, therefore, that actions for divorce may not be referred for trial even with the consent of the parties.

V. Section 2222, under the construction we have adopted, is not in conflict with §§ 2815 and 2816. These being general in their character cannot be regarded as inconsistent with the other, which is special and applicable alone to divorce cases. Such cases are taken out of the operation of the general statute by the special provisions of § 2222. These several sections being *in pari materia* must be so construed together that all may stand. Under our construction the

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several provisions are sustained according to the clearly expressed legislative intention.

VI. It is urged that the cause was tried by the court, and the statute which we have had under consideration, was, therefore, complied with. This position depends for support upon the fact that the referee returned his report, with the evidence taken by him, which was duly considered by the court.

After the coming in of the report defendant, according to the usual practice, filed exceptions thereto on various grounds, among others, that the findings of facts by the referee are in conflict with, and unsupported by, the evidence. These exceptions were tried by the court in the manner of reviewing the finding of facts by referees. The court, we presume, examined the evidence and decided upon the exceptions in the light of such examination. But we cannot denominate such determination of the exceptions upon a consideration of the evidence, a trial of the case by the court. It was more in the nature of a review for the correction of errors. Whatever it may be like, certain it is that it is not and never has been called a trial, as the word is used in law. It is not the trial in *open court*, required in this class of cases.

VII. But it is said that the court adopted the findings of the referee upon the examination of the evidence, and, therefore, such findings become those of the court and no prejudice could have resulted therefrom. The answer to this is that the law does not contemplate such proceedings, and permits the courts no such aids, if aids they be, in the administration of justice. The parties are by the law entitled to the unbiased and untrammeled judgment of the judge applied to their case. Instead of this, it is examined by him with the view to determine whether the findings of the referee are supported by the evidence. The examination, necessarily, is of such a character that the influence and weight of the findings are against the party excepting thereto. The court must overcome these findings in order to render judgment for the party excepting. It will at once be seen that the judge does not try exceptions to the referee's report with that free-

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dom of mind he gives to an original trial on the evidence. It requires no argument to show the prejudice resulting to defendant from such a course of proceeding in this case.

VIII. Code, section 2222, provides that the court in actions of this kind may appoint a *commission* to take evidence. It ~~a~~ ^{is} insisted that the referee in this case is a ~~commission-~~ ^{commiss-} sioner of the kind provided for in this statute. The distinctions between a commissioner and a referee are well understood by the profession. They need not be enumerated here. The court appointed a referee to take the evidence, and "settle the issues of law and fact—to determine all issues, and make report of findings therof." Surely, it cannot be seriously argued that the referee acted simply as a commissioner to take evidence. The record shows that he discharged all the duties of a referee, determined all issues of law and fact, and made report of his findings thereon. If he be regarded as a commissioner his duties were confined to taking the evidence; his findings of facts and law, and other acts, were without authority of law and void.

IX. The court in the appointment of the referee directed and required him to take and report the evidence. This ~~a~~ ^{is} power, but no other or further, the court could, ~~a~~ ^{under} § 2222, lawfully confer upon the person designated in the order. To the extent of the authority lawfully conferred upon him, the referee could act. The evidence was lawfully taken and reported by him. As it remains in the court below there exists no necessity to take it again, in any form, to be used upon the trial of the cause before the court. Whatever evidence was taken by the referee may be used upon the trial when it shall be had in the court below. The fact that the order of appointment designates the person appointed as a referee, did not deprive him of authority to take the evidence. The law, § 2222, under which the appointment to take and report the evidence is held valid that far, provides that a *commission* may be appointed for that purpose. The designation of the person appointed as a referee would not defeat the acts done by him with lawful authority. Such designation, if not strictly proper, did not defeat the order

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of appointment, so far as it conferred powers within the authority of the court. The evidence taken by the referee will of course be subjected to all well founded objections to its relevancy and competency, to be determined at the trial by the Circuit Court. The parties will have the right to introduce upon the trial other evidence.

X. It is said that, as the case is triable *de novo* in this court and we have before us all the evidence, it must be determined thereon, without regard to errors committed ^{8. — : —} ~~trial de novo.~~ by the court below; that the reference, at most, was but an error, and is, therefore, no impediment to a rehearing in this court. Without inquiring whether the evidence was so taken and preserved, and is so certified, that a trial *de novo* may be had here, we may, for the present purpose, admit the proposition to that effect. But the defendant was entitled to a trial upon the evidence, in the manner prescribed by law, and before the court having exclusive cognizance of the case, prior to a determination of the issues by this court. The submission of these issues to a tribunal forbidden by law to determine them deprived the defendant of the right to a trial in a lawfully constituted court. Of this right he cannot be deprived without prejudice and, probably, without great injustice. At all events, the right is secured to defendant by law, and we must be careful that it is not denied him. To the end, therefore, that justice may be administered by the tribunal and in the form appointed by law, the decree of the Circuit Court is reversed, and the cause is remanded for further proceedings in the court below, in accord with the law as announced in this opinion.

REVERSED.

ROTHROCK, J., took no part in the decision of this case.

Metcalf and Simpson v. Hoopingardner.

METCALF AND SIMPSON v. HOOPINGARDNER.

1. **Partition: SALE OF COMMON PROPERTY: JURISDICTION.** Where property owned in common cannot be equitably divided, it is competent for the court to direct, in an action for partition, that the common property be sold and the proceeds divided.
2. **—: TENANT IN COMMON: PARTIES.** Where one of the tenants in common had covenanted to keep the property in repair, the allegation that he has been guilty of a breach should be tried in the action for partition, and the holder of a judgment against one of the tenants in common should be made a party to the action.

Appeal from Hardin Circuit Court.

WEDNESDAY, APRIL 4.

THIS action is for the partition of a grist mill. It is alleged that plaintiffs are the owners of the undivided one-half of the property, and that the defendant is the owner of the other undivided one-half. There is an abstract of title exhibited with the petition, which shows that there is a mortgage executed by plaintiffs upon said property which is unsatisfied, and that there is a judgment lien as against defendant, and also a mechanics' lien, and certain delinquent taxes. It is averred in the petition that the property has been in possession of plaintiffs, they having leased defendant's interest; and that during said tenancy plaintiffs at their own expense erected a small dwelling house for the use of their miller, and also a corn-crib and about fifty rods of fence around a hog lot, and that there are certain machines in the mill which are wholly the property of the plaintiffs. It is asked that plaintiffs be permitted to remove this property, it not being any part of the real estate owned in common by the parties. It is further averred that said mill property is indivisible, and that the only partition that can be made is by a sale and division of the proceeds. The prayer is that the plaintiffs be permitted at any time during their occupancy to remove the said property which they claim to be theirs absolutely, and that, in case the court shall find that the common property cannot be

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advantageously divided into the requisite shares, the same may be ordered to be sold.

The answer admits that the plaintiffs are the owners of one undivided half of the property, and that defendant is the owner of the other undivided one-half; alleges that plaintiffs' interest is encumbered by a mortgage of \$2,300, for purchase money; that by the lease made by defendants to plaintiffs they were to keep the mill in good repair, and that they suffered it to get out of repair; that it will require an expenditure of from \$200 to \$400 to put the mill in as good repair as by their lease the plaintiffs were required to have it, at the expiration of their lease. The answer protests against the right of plaintiffs to have a partition of the property by sale, and avers that there is no authority or power in the court to compel a sale of defendant's interest in the property.

There was an order of sale made upon the petition and answer without any evidence being taken. The order permits the plaintiffs to remove from the premises the property claimed in the petition as the individual property of plaintiffs. Defendant appeals.

E. W. Eastman, for appellant.

C. N. Nagle and Huff & Reed, for appellees.

ROTHROCK, J.—I. The petition and answer contain many allegations which in our view of the case are redundant and irrelevant. They consist of allegations as to the ability and inability of the parties to agree, as to the necessity of repairs, the time when the mill was erected, when plaintiffs bought their interest, and as to whether the parties can or cannot harmoniously operate the mill together. Much of the argument of counsel for appellant is in support of the proposition that there is no constitutional power to require a partition to be made by a sale of the common property and a division of the proceeds.

1. PARTITION: sale of common property.

Section 3290 of the Code provides that the court shall appoint referees to make partition into the requisite number of shares, or if it is apparent, or the parties so agree, that the

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property cannot be equitably divided into the requisite number of shares, a sale may be ordered.

It appears from the petition and answer in this case that the property cannot be equitably divided, and so far as the practicability of a division is involved no question is made.

The power of the legislature to provide that the shares of all the parties shall be sold, where a division of the land cannot be made, has been too long acquiesced in to be now called in question. We think the owner of an undivided interest in real estate has the right at any time to have partition made; and, if the premises cannot be divided by metes and bounds, he has a right to compel a sale, that he may have and hold his interest in the proceeds in severalty.

Such a proceeding is not depriving a party of his property without due process of law. When parties, by contract, assume the relation of tenants in common in real estate, the law fixes their respective rights, one of which is that the partnership may be dissolved, so to speak, and that if necessary the common property may be sold and the proceeds divided.

II. The Code, Sec. 3277, provides that the action for partition shall be by equitable proceedings. The answer in this case sets up that rents are due to the defendant, and that the plaintiffs, while in possession under the lease, allowed the mill to become out of repair to the extent of from \$200 to \$400, for which they are liable under their lease. The court below should have heard the parties upon these allegations. Equity demands that the rights of the parties be ascertained; and the defendant was entitled to have a hearing upon the allegations of his answer.

The abstract of title shows that there is a lien upon the undivided one-half of plaintiffs' share for the purchase money. It is true this lien purports to be on the whole property, but as the mortgage was not executed by the defendant it cannot affect his interest. The abstract further shows that there is a judgment lien against the interest of the defendant. It is required, by section 3287 of the Code, that if the lien be upon one or more undivided interests the holder thereof shall be made a party. This has not been done. The lienholders

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should have been made parties, and an account of the amount due on their liens should have been taken, before the order of sale was made. There is a manifest propriety in that proceeding. It is evident that if the amount of the liens be ascertained before sale, and provision be made for their payment by the decree, a purchaser will know just the extent of the liens, their rate of interest, and interest of the respective parties, and the court will be prepared upon the coming in of the report of sale to make such order as will protect all parties.

The cause will be reversed and remanded, with leave to the plaintiffs to make the lienholders parties (if such liens still exist), in order that an account of the liens may be taken. And the parties should be allowed to present their respective claims for improvements, and for violation of the provisions of the lease, and their rights should be adjusted before an order of sale is made.

REVERSED.

UPDEGRAFT V. EDWARDS ET AL.

1. **Promissory Note: INDORSEMENT: MORTGAGE.** The transfer of a note by indorsement carries with it the mortgage and frees the mortgage in the hands of a good faith holder, like the note, of any equities between the original parties.
2. **Practice: DEMURRER.** Where the parties have recognized in a stipulation the fact that a demurrer has been tendered, they cannot afterwards object that the demurrer should not be considered because it is not in proper form.

Appeal from Clay District Court.

THURSDAY, APRIL 5.

ACTION to foreclose a mortgage securing a promissory note. The makers of the note and others claiming an interest in the land were made parties. The court rendered a general judgment against the makers of the note, and entered a decree

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canceling and setting aside the mortgage. Plaintiff appeals. Other facts of the case appear in the opinion.

Samuel Gonser, for appellant.

E. E. Snow, for appellees.

BECK, J.—I. The petition alleges that the note was indorsed to plaintiff before maturity and for value. It contains proper averments of facts entitling plaintiff to judgment against the makers, and to the foreclosure of the mortgage given to secure the note. J. J. Wilson & Co. are made defendants, on the ground that they have, or claim to have, some lien or claim upon the mortgaged property which is inferior to plaintiff's lien.

The defendant, Edwards, and his wife (makers of the note), answered, setting up that on account of certain transactions between them and the payee of the note, whereby the payee became indebted to defendants, he agreed that the note should be discharged by defendants crediting the amount thereof upon their claim against him. The answer admits "that plaintiff is an innocent purchaser of said note before due and for value, and without notice of the equities herein set out."

Wilson & Co., in their answer, allege that they recovered a judgment against the makers of the note, which was declared a lien upon the same property covered by the mortgage. The ground upon which this judgment was made a lien is that the property was purchased and improved by defendants, Edwards and wife, out of the proceeds of property owned by Wilson & Co., and appropriated to his own use by Edwards while he was employed as an agent of Wilson & Co. This judgment was rendered after the execution and recording of plaintiff's mortgage, and proceedings in the action appear to have been commenced subsequently to the attaching of plaintiff's lien. The answer admits the indorsement of the note by the payee to plaintiff, and charges that the indorser is liable thereon.

To these answers plaintiff demurred. Thereupon the fol-

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lowing stipulation was entered into by the parties and filed in the case:

"It is hereby stipulated by and between the parties hereto that there shall be no further pleadings filed in this cause, other than plaintiff's petition, defendants' answers, and plaintiff's demurrer thereto, and that all parties shall stand upon their respective pleadings; that if plaintiff's demurrer is overruled defendants shall take judgment in this court without proof, as prayed in their several answers; and if said demurrer is sustained plaintiff shall have judgment without proof as prayed in his petition. Each party reserves the right of appeal."

The demurrer was submitted and overruled. But the court rendered judgment against Edwards and wife for the amount of the note, and entered a decree canceling the mortgage.

II. The decision of the court overruling the demurrer and the decree canceling the mortgage are erroneous.

The note having been indorsed before maturity to a good faith holder cannot be affected in his hands by any equities

1. PROMISE: held by the makers. The mortgage securing the
SORY note: debt passed by the transfer of the note and was
Indorsement: held in a like manner free of equities between the
mortgage. original parties. *Preston, Kean & Co. v. Morris, Case & Co., 42 Iowa, 549.*

III. The judgment of Wilson & Co., being junior to plaintiff's mortgage, and no bad faith shown on the part of plaintiff, his lien is paramount to the judgment.

IV. It is urged by defendants that plaintiff's demurrer is not in proper form. If this be so they cannot, after recognizing its sufficiency in the stipulation, under 2. PRACTICE: demurrer. which the case was submitted, now take advantage of the defect.

V. The defendants, Wilson & Co., claim that plaintiff has not assigned as error the overruling of the demurrer to their answer. As we have said, the demurrer was to both answers —there was but one demurrer in the case. In his assignment of errors plaintiff designates the demurrer as being to the answer of Edwards. But this is sufficient to indicate that the ruling

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thereon is assigned for error. It was overruled as to Wilson & Co.'s answer, against which it was directed. The plaintiff, clearly designating the demurrer, assigns as error the ruling thereon. This is sufficient.

VI. The court should have sustained the demurrer and rendered judgment upon the pleadings and stipulation against the makers of the note, and entered a proper decree of foreclosure declaring the mortgage to be paramount to Wilson & Co.'s judgment.

REVERSED.

THE STATE v. WAYNICK.

1. **Criminal Law: INTOXICATING LIQUORS: NUISANCE.** The selling of intoxicating liquors for any purpose whatever, without permission first obtained from the board of supervisors, is a misdemeanor, and any person who uses a building for this purpose is guilty of committing a nuisance and may be punished therefor.

Appeal from Lucas District Court.

THURSDAY, APRIL 5.

THE defendant was indicted and tried for the crime of nuisance, in keeping and controlling a certain house at which he kept for sale, and did sell, intoxicating liquor. The evidence tended to show that the defendant kept a drug-store, and at such drug-store sold for medicinal purposes, but without a permit, intoxicating liquor. The District Court instructed the jury as follows:

“1st. The object and purpose of the prohibitory law is to prevent the sale of liquor to be used as a beverage, and not to punish physicians for selling it as a part of their medical prescriptions and practice.

“2nd. A physician may, as a physician, prepare in person, and sell medicine in his practice, made up in whole or in part of liquor, wine or alcohol, and not be guilty of violating such law.

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"3rd. If a physician makes out a prescription and sends his patient, or any one for him, to a druggist to obtain the same, such druggist may put it up and take pay for it from the person, though the same may be composed in part or in whole of intoxicating liquors.

"4th. The important question is, was the transaction, the selling, whether by the physician in selling himself, or in making the prescription for the druggist, and the druggist in compounding or putting up and taking pay for the prescription sent him by the physicians—were all or any of these things done in good faith, and was the liquor sold honestly and in good faith for medicine, and not under color or under pretense of selling medicine as a subterfuge to cover up the selling of liquor for drinking as a beverage?

"5th. If it was sold in good faith as medicine, under the circumstances hereinbefore set out, then the sale is not illegal.

"If it was sold to be used as a beverage, then it is of no consequence what it might have been called or how it might have been covered up, it is a violation of the law.

"6th. What is needed more than anything else in all these matters is good common sense. By the use of good practical sense in the consideration of all the evidence and circumstances, and the men involved in the case, or connected with the case, you will easily get at the very truth of the matter, and that is what it is your duty to do.

"The liquor law should be administered, as should every other law, in accordance with its true spirit, and to that end all far-fetched, technical violations of it should be disregarded, and so should all subterfuges adopted by any one to violate it, under pretense of doing something else.

"You are instructed that the State should fully satisfy your minds of the truth of all the matters of fact necessary to be proved to establish the person's guilt, as it is usually termed, beyond a reasonable doubt, as to the truth of such facts.

"The State asks me to say that the law is that the defendant would be liable for any sale unlawfully made by his clerk, the same as if sold by himself. This is correct."

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The following instruction asked by the State was refused:

"A druggist has no right to sell intoxicating liquor even for medicinal purposes, unless he has a permit as required by law, and it is his duty to show that he has a permit to sell liquor, as a defense."

Judgment for defendant. The State appeals.

M. E. Cutts, Attorney General, and T. M. Fee, for the State.

Thorpe & Son, for appellee.

ADAMS, J.—Section 1526 of the Code contains the following provision:

"Any citizen of the State except hotel-keepers, keepers of saloons, eating houses, grocery keepers and confectioners, <sup>1. CRIMINAL
slave intoxica-</sup> is hereby permitted, within the county of his residence, to buy and sell intoxicating liquor for ^{ting liquors:} mechanical, medicinal and sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which such business is to be conducted."

The four sections following the said section provide for the manner of obtaining such permission. Other sections provide the manner of conducting the business. Others still, provide the grounds for which and the manner in which the permission may be declared vacated. Sec. 1540 provides that, "if any person not holding such a permit, by himself, his clerk, servant or agent, shall, for himself or any person else, directly or indirectly, or under any pretense or by any device, sell to any person intoxicating liquor, he shall be deemed guilty of a misdemeanor," etc.

The defendant was not indicted under this section, but was indicted for the crime of nuisance. The theory of the District Court, we think, must have been that a person selling without a permit is subject to punishment only under said section 1540. But section 1543 provides that, "in cases of violation of the provisions of either the three preceding sections * * * the building or erection of whatever kind, or the ground itself

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in or upon which such unlawful manufacture or sale, or keeping with intent to sell, of any intoxicating liquor is carried on * * * is hereby declared a nuisance and may be abated as the law provides; and in addition to the penalties prescribed in said sections, whoever shall erect * * * or use any building * * for any of the purposes prohibited in said sections shall be deemed guilty of a nuisance and may be prosecuted and punished accordingly, in the manner provided by law." It appears then that, by section 1540, the selling of liquor without a permit is made a misdemeanor, and the person guilty is punishable as therein prescribed; and, by section 1543, any person who uses a building to violate the provisions of section 1540 is guilty of a nuisance and may be subjected to additional penalties for the crime of nuisance.

We think that the District Court erred in its instructions, and that the case must be

REVERSED.

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HENDERSON v. SIMPSON.

1. **Highways: CONTROL OF ROAD FUND: ROAD SUPERVISOR.** The township trustees have not control over the road fund in the hands of the township clerk, save that part of it which may be set aside for general township purposes; the balance is to be expended in his discretion by the road supervisor, and he has a right to demand and receive it from the township clerk.

Appeal from Sac District Court.

THURSDAY, APRIL 5.

THE plaintiff is supervisor of Road District No. 1, of Clinton township, Sac county, Iowa. The defendant is clerk of said township. The petition avers that the treasurer of Sac county has collected and paid over to the defendant \$147.16 of the road fund of said township, which said sum was wholly collected within the limits of said district No. 1; that it is

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the duty of the defendant to pay over the same to the plaintiff, to be by him expended in working and repairing the highways in said district; that he had demanded said money of the defendant, but that defendant has refused to pay the same. The plaintiff further avers that the highways in his district are in poor condition, and that the money is needed to repair them. He asks, therefore, for a writ of *mandamus* commanding the defendant to pay over said money to him.

The defendant, for answer, avers that the township trustees passed a resolution directing the defendant not to pay over said money to the plaintiff without a written order signed by at least a majority of them, and he denies that the plaintiff is entitled to said money without such order. To the answer the plaintiff demurred upon the following grounds:

“1. No order from the trustees of the township is necessary or required by law in order to entitle the plaintiff to the road fund in the hands of the defendant and belonging to the road district of which he is supervisor.

“2. The township trustees have no legal right to require the defendant to pay out the road fund in his hands upon their written order only; and such an order is not binding upon the defendant, and is no defense to this action.”

The court overruled the demurrer and rendered judgment for the defendant. Plaintiff appeals.

Duffie & McDaid, for appellant.

Stanfield & Elwood, for appellee.

ADAMS, J.—The tools and machinery necessary for the construction and repair of highways are to be owned, not by the several road districts, but by the township. Guide boards are to be put up by the township. It is necessary, therefore, that there should be a township fund in distinction from the several district funds.

By section 970 of the Code it is provided that “the township trustees shall set apart such portion of the road tax as they may deem necessary for the purchase of tools, machinery,” etc. It is made the duty of each supervisor to collect the

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road tax in his district and pay over to the clerk so much as has been set apart for the general fund, and to expend the balance in his district.

If in this case the supervisor had succeeded in collecting all the tax the question involved in the case would not have arisen. The money to be expended by the supervisor in his district would have been retained by him. But a portion of the tax was due from non-residents, and was for that reason collected by the county treasurer, who paid the same to the defendant. The tax thus collected is the tax in controversy.

It will be seen at once that it did not become a part of the general township fund by reason of its having come through the county treasurer's hands to the defendant.

If it became a part of the general township fund it was because it was necessary to regard it as a part set apart by the township trustees as such fund. Whether the plaintiff had previously paid over to defendant the amount to be collected and paid over as a part of the general township fund does not appear from the petition. If he had not, it is clear that the defendant should retain the money, or so much thereof as is due from the road district to the general fund. There is some doubt, therefore, as to the sufficiency of the petition; but the defendant has not made this point. On the other hand, it seems to be assumed that if the defendant has a right to hold the money as under the control of the township trustees, it is not upon the ground that it is due to the general fund as money originally set apart for that purpose.

The question which we understand the parties as presenting, and upon which they ask the decision of this court, is whether, 1. **HIGHWAYS:** conceding that the amount due the general fund, ^{control of} ~~road fund:~~ as originally set apart for that purpose, had been ~~road super-~~ paid to the clerk, the money in question passes into the control of the trustees, and simply by reason of its having come into the hands of the clerk from the county treasurer.

To show that it did pass into the control of the trustees, the defendant cites and relies upon section 996 of the Code, which provides in substance that the trustees at their meeting

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in October shall, after settling with the supervisors for putting up guide boards and other services, order such distribution of the funds in the hands of the township clerk as they may deem expedient for highway purposes.

The funds spoken of are the funds in the hands of the township clerk; and it is urged with much force that the statute means all the funds in the hands of the clerk, including, not simply those set apart for the general township fund, but those in the hands of the clerk which can be expended only by each supervisor. As those funds, however, would have been expended by him without coming into the hands of the clerk, if they had been collected by the supervisor instead of the county treasurer, the fact that they came into the hands of the clerk seems to be a mere incident to the mode of collection. It does not divert their use; it should not, we think, change their character. There is an absurdity, indeed, in charging the trustees with the duty of distributing the funds as they may deem expedient for highway purposes, when the destination of the funds is fixed by law, and there is no discretion to be exercised by the trustees in regard to it. Code, Sec. 982.

We come, then, to the conclusion that the funds of which distribution is to be made by the trustees as they may deem expedient for highway purposes, as provided in section 996, are such unexpended balance as there may be of the money originally set apart by the trustees as the general township fund; that all other money is to be expended necessarily by each supervisor in the road district in which it is collected, and that the fact of its coming into the hands of the clerk is a mere incident to its collection.

It follows that the demurrer to the defendant's answer should have been sustained, and the judgment of the District Court must be

REVERSED.

Monahan v. The Keokuk & Des Moines Railway Co.

MONAHAN v. THE KEOKUK & DES MOINES RAILWAY CO.

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1. Railroad: RATE OF SPEED IN DEPOT GROUNDS: STOCK. Under section 1289 of the Code, railway companies are liable for all stock killed on depot grounds, by trains running at a rate of speed greater than eight miles an hour.
2. ——: ——: CONSTRUCTION OF STATUTE. The statute above cited imposes no restriction upon the rate of speed of trains outside of the limits of depot grounds, and the liability of a railway company for stock killed just beyond the limits is not affected by the fact that its train was running faster than eight miles an hour.

Appeal from Van Buren Circuit Court.

THURSDAY, APRIL 5.

ACTION to recover double the value of certain horses, alleged to have been injured and killed by being run over by a train on defendant's road. The petition states the horses were killed on the night of the 20th day of August, 1874, and were of the value of \$228; that plaintiff gave the defendant verbal notice of the time and place of the injury, and demanded payment, which was refused; that on the 29th day of January, 1875, he gave defendant a written notice as provided by law. In an amendment to the petition, it was stated the horses were killed near the edge of the limits of the village of Kilbourne, and within less than one-fourth of a mile of the depot grounds in said village, by a train of defendant, which was running at an unlawful speed so near the depot grounds; that the road was straight or nearly so for a mile or more, east of where the horses were killed; that the night was not dark, and the horses could have been readily seen, and the train stopped before reaching them, and that the killing was by reason of defendant's gross and willful negligence. A demurrer was sustained to the petition and amendment, on the ground that there could not be a recovery of double the value of the horses.

Afterward a further amended petition was filed, stating that the horses were killed and injured upon the depot grounds,

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necessarily used by the defendant and the public, and which grounds were unfenced, and that at the time of said injury and killing the train was running at a greater rate of speed than eight miles per hour.

The answer consisted of a general denial, and set up certain matters as an excuse for the rate of speed at which the train was running, as tending if proved to show there was no negligence. There was a verdict and judgment for the plaintiff, and defendant appeals.

Lea & Beaman, Gillmore & Anderson and John Fyffe, for appellant.

Chas. Baldwin and Williams & Work, for appellee.

SEEVERS, J.—Certain interrogatories were propounded to the jury and answered by them. Among others the jury found specially that the train was being run at more than eight miles per hour, and in consequence thereof the horses were injured and killed, and that they would not have been killed if the train had been running at a rate of speed not exceeding eight miles per hour. The jury failed to answer an interrogatory as to whether or not the horses were injured and killed on the depot grounds, and upon being inquired of by the court why they had not answered said interrogatory the jury responded they were unable to agree on that point. There was a general verdict for the plaintiff which together with the special findings was received by the court as the verdict.

A motion for a new trial was made on the ground, among others, that the court erred in not requiring the jury to find specially whether the horses were injured and killed on the depot grounds.

In overruling the motion the court determined the horses were not killed on the depot grounds, but that if they were killed by reason of the train being run on such grounds at an unlawful speed, it was immaterial whether they were killed

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on such grounds or not, and hence, if the jury had found the horses were not killed on the depot grounds, still the plaintiff would be entitled to judgment. It is proper to say the horses were killed at a place where the defendant had no right to fence.

In the opinion of the court below, in which we concur, the right to recover exists, if at all, under and by virtue of the statute, and not at common law by reason of negligence. It therefore becomes necessary to place a construction on section 1289 of the Code.

Previous to the enactment of the Code these corporations were made liable for all stock killed or injured where the 1. RAILROAD: company had the right to fence and failed to do rate of speed on depot grounds: so, and the question of negligence in running the stock: train was wholly immaterial. The negligence consisted in the failure to fence, and they were made absolutely liable for such failure. As the law then stood there could be no recovery for stock killed on depot grounds unless negligence was shown. There was added to this law by the Code the following: "The operating of trains upon depot grounds necessarily used by the company and the public, where no such fence is built, at a greater rate of speed than eight miles per hour, shall be deemed negligence, and render the company liable under this section." Now, for what is the company liable under this addition to section 1289? Clearly, we think, for all stock killed on depot grounds by trains when running at a rate of speed greater than eight miles per hour, and this is the extent of the liability.

Previous to this addition to the statute the right and failure to fence was the test of liability. Upon depot grounds the rate of speed is now the test and, it seems to us, must be held to apply only to stock killed on such grounds.

In the present case the horses were killed just before the train entered the grounds. It was then running at the 2. ---: ---: rate of fifteen or twenty miles an hour, which construction of statute. rate was continued through such grounds. Now, it may be, if the train had been running at the rate of eight miles an hour just before the horses were struck, it might

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have been stopped before the collision occurred. It may be said the jury have so found, but this, we think, is immaterial, because there is no statute regulating the rate of speed at the place where the collision occurred.

It may be conceded it would have been competent for the General Assembly to have made this test begin one mile, or at any other reasonable distance, before entering the grounds, and to end after the train had passed the same distance beyond. But the statute contains no such provision, and a recovery must be had, if at all, under and by virtue of the statute. Besides this, where shall the liability begin and end? That is, at what point before the train reaches the grounds must it be running at eight miles an hour? It may be said, at such distance as the train can certainly enter the grounds at that rate, but this must depend on the grade, weight of the train, and condition of the rails at the time. We think no such rule was intended, and that the only thought of the addition made to the Code was to fix the liability for stock killed on depot grounds. It was, therefore, material that the jury should have answered the interrogatory as to where the horses were killed, and, as the court below determined the weight of the evidence was they were not killed on such grounds, a new trial should have been granted.

The foregoing views are in accord with those of the writer of the opinion in *McKonkey v. C., B. & Q. R. Co.*, 40 Iowa, 205.

REVERSED.

Austin v. Walker.

AUSTIN V. WALKER ET AL.

1. **Usury: SALE OF GOLD.** A note and mortgage executed to secure a loan of gold at a higher rate of premium than the market value of the gold are usurious.
2. _____: RULE APPLIED. A. loaned \$1,700 in gold to W., stipulating that although the market value of gold was ten per cent premium he should receive fifteen per cent, and the note and mortgage were executed in accordance therewith: *Held*, that the transaction was usurious.

Appeal from Wapello Circuit Court.

THURSDAY, APRIL 5.

THIS is an action upon a note of \$2,000, dated September 28, 1874, payable in one year, with interest at the rate of ten per cent, and for the foreclosure of a mortgage executed to secure the same.

The answer alleges that the note and mortgage are usurious. The court found that by mistake the note was executed for \$45 too much, and rendered judgment against the defendant, John S. Walker, for \$2,254.69, the amount of said note and interest, deducting said \$45, and against the defendants, John S. and R. B. Walker, for \$100, attorneys fees, and \$7.50, the cost of keeping the mortgaged premises insured, and foreclosed the mortgage. The defendants appeal. The facts are stated in the opinion.

Stiles & Burton, for appellants.

A. W. Garton and Wm. McNett, for the appellee.

DAY, CH. J.—I. The following facts are undisputed: On the 28th day of September, 1874, the defendant, John S. ^{1. USURY:} Walker, was desirous of negotiating a loan from ^{sale of gold.} plaintiff, and on that day he procured from plaintiff \$1,700 in gold coin, and executed his note therefor for \$2,000, payable in one year, with interest at ten per cent. At that time the premium upon gold was from $9\frac{1}{4}$ to 10 per cent.

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The defendant testified that he was to allow 10 per cent premium upon the gold, and was to pay 15 per cent interest for the use of the money; that the ten per cent premium and 5 per cent interest were taken out of the sum called for upon the face of the note, and that the arrangement was made as a cover for usury.

The plaintiff, upon the other hand, testifies that he told defendant that he had no currency to loan; that he had gold coin deposited in the bank; that he did not wish to sell it at the then current premium, and would not sell it unless he got 15 per cent; that it was a gold transaction, and the agreement was to pay 15 per cent premium upon the gold and ten per cent interest on the loan, and that he had no intention direct or indirect to take more than ten per cent interest upon the note. Plaintiff further testified that he sold the gold for 5 per cent above the market value of gold at that time, and that about or near that time he sold gold for 10 per cent premium.

The court found: "That the consideration for which said note was given was the sale of two thousand dollars in gold coin, by plaintiff to defendant, at an agreed premium of 15 per cent on the same, and that in the calculation of said premium there was a mistake of forty-five dollars against the defendant," and, upon the issue of usury presented by the pleadings, the court found for the plaintiff. It is claimed by appellee that these findings stand as the verdict of a jury, and cannot be disturbed unless clearly unsupported by the evidence. This would be true if the findings were purely findings of fact. But, in this case, a finding that the transaction between the parties was a sale of gold, and not an usurious loan, partakes more of the nature of a legal inference or conclusion than of a mere finding of facts, and no presumption in favor of it can be indulged in by this court.

What, then, are the facts? The defendant applied to plaintiff for a loan to discharge a mortgage, which, it seems, was about to be foreclosed. Defendant obtained in gold coin \$1,700, at the current rate of premium equivalent to not more than \$1,870. For this he executed his note secured by mortgage, for \$2,000, payable in one year, with interest at the rate

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of ten per cent. The bald fact appears that the note was executed bearing the highest legal rate of interest, for \$130 more than the sum realized in currency. In *Clark v. The City of Des Moines*, 19 Iowa, 199, it was held that city warrants, issued by a municipal corporation, in payment of a judgment at the rate of one dollar in warrants for every seventy-five cents due on the judgment, are tainted with usury. In that case it is said: "If I purposely and knowingly give my note for \$100, payable on demand, in satisfaction of a debt or judgment of only \$75, it is *prima facie*, and perhaps conclusively usurious." In *Arnold v. Potter*, 22 Iowa, 194, it is said: "The form of the transaction is nothing, the cardinal inquiry being, when the contract specifying the amount reserved is express, did the parties resort to it as the means of disguising the usury in violation of the laws of the State where the contract was made or to be executed. And, in arriving at this intention, all of the facts are to be taken into consideration."

In view of the facts shown by the testimony, the statement of plaintiff that there was no intention to exact more than ten per cent for the use of the money, is entitled to but little consideration. Intention cannot well be established by direct testimony. It is most satisfactorily determined from conduct, relations and actions. And judging the intention in this case from the value of gold and the relations of the parties in connection with all the circumstances proved, we have no hesitancy in pronouncing the subterfuge of allowing and exacting five per cent more for gold than its real market value a mere cloak for the cover of usury, and that the note is in fact usurious.

II. The mortgage contains an agreement to pay ten per cent upon the amount of the debt as attorneys fees, in case it becomes necessary to institute proceedings to foreclose the mortgage. The court allowed \$100 as attorney's fees. Appellants claim that plaintiff should have been allowed only the sum of \$40 as attorney's fees, because he had an agreement with his attorney to foreclose the mortgage for that amount.

The evidence, however, we think, fails to show an absolute

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agreement with the attorney to foreclose the mortgage for that amount, if it should be contested.

For the error of the court in holding that the note was not usurious, the judgment is reversed, and the cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

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Moss & Co. v. DEARING ET AL.

1. **Evidence: ADMISSIONS.** In an action to set aside a conveyance as fraudulent, the admissions of the grantor to third persons before the conveyance was made that he was indebted to the grantee are admissible.
2. **Conveyance: WHEN NOT FRAUDULENT: JUDICIAL SALE.** Where a party who is indebted to another procures a conveyance of real estate which he has purchased to be made to the creditor, and the latter receives it in good faith with no other apparent intention than to secure his claim, his title will not be defeated by a subsequent confession of judgment by his grantor in favor of another creditor, and a sale of the property under execution issued upon the judgment.

Appeal from Wapello District Court.

THURSDAY, APRIL 5.

THE material averments of the petition are in substance as follows: It is charged that on the 28th day of December, 1865, plaintiffs recovered a judgment by confession against the defendant, Wm. Dearing, for \$1,500. On the 11th day of January, 1866, an execution was issued on said judgment, and a levy was made on a lot in the city of Ottumwa; that said lot was duly appraised, advertised for sale, and sold to the plaintiffs, and a sheriff's deed made to them therefor; that at the time of the levy and sale the legal title to said lot was in the name of C. D. Hamilton and Ann Hamilton, defendants, who took their title from M. J. Williams; that defendant, Dearing, paid the entire consideration for said lot, and that at the time of said conveyance he was largely in-

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debted in the State of Missouri, and caused the conveyance of said property to be made to said Hamiltons to prevent the same from being subjected to the payment of his debts, and that the said Hamiltons well knew that said conveyance was so made for said fraudulent purpose; that the defendants, A. P. Shafer and W. C. Hearn, purchased or pretended to purchase said lot from C. D. Hamilton and A. E. Hamilton, but that they had no right to said land because they purchased with full knowledge of plaintiff's rights thereto, and these proceedings against said lot.

The prayer of the petition is that the plaintiffs' title to the lot in question be quieted, and for general relief.

The defendants, C. D. and Ann Hamilton, claim that defendant Dearing was indebted to them, and purchased said lot and caused the deed therefor to be made to them in good faith, as part payment of said indebtedness, which was accepted in good faith, and that they had no knowledge of any design on the part of said Dearing to defraud his creditors. They deny that Dearing was in good faith in debt to plaintiffs at the time said judgment was rendered, and allege that said judgment was part of a fraudulent scheme to cheat said defendants out of said lot. They further allege that they sold and conveyed said lot to the defendants, A. P. Shafer and Wm. C. Hearn, on the 18th day of August, 1866, and ask that the title thereof be quieted in said parties.

Defendants Shafer and Hearn aver that they are the owners of said lot; that they purchased the same for a full and valuable consideration, in good faith, and without any knowledge of said lot being conveyed to said Hamiltons by said Dearing with any fraudulent intent. They ask that their title be quieted.

There was trial by the court, and a decree entered dismissing plaintiffs' petition and quieting title to the property in controversy in the defendants, Shafer and Hearn. Plaintiffs appeal.

Stiles & Burton, for appellants.

W. H. C. Jaques, for appellees.

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ROTHROCK, J.—I. Objection is made by appellants to certain parts of the deposition of the defendant, C. D. Hamilton, and also to parts of the deposition of Aaron Hamilton.

1. EVIDENCE: admissions. The testimony objected to relates to conversations with the defendant Dearing at and about the time the conveyance was made to C. D. Hamilton, as to the object and purpose of the conveyance, and the alleged indebtedness from Dearing to C. D. Hamilton. We think the objections are not well taken. It was competent for the defendant, C. D. Hamilton, to prove his alleged contract with Dearing in the same manner that any other issue could be proved. He could not be limited to calling Dearing as a witness, but had the right to show the good faith of the conveyance to him by Dearing's conversations and admissions, which occurred before the plaintiffs acquired any interest in the property. Surely, the statement made to Aaron Hamilton in October, 1865, that on a fair settlement he (Dearing) owed C. D. Hamilton \$480 or \$485, was admissible as between these parties to prove the fact. Greenleaf on Ev., vol. 1, Sec. 181.

II. There are some conceded facts in the case which will be briefly stated. Dearing paid Williams for the lot in controversy, and directed the conveyance to be made 2. CONVEY-
ANCE: when
not fraudu-
lent: judicial
sale. to C. D. and Ann Hamilton. The deed was retained by Dearing. It has never been delivered to the grantees, nor filed for record. The plaintiffs claim under a sheriff's deed founded upon a confession of judgment made by Dearing in their favor for \$1,500, part of the purchase price of a farm, the payment of which they assumed for Dearing. Dearing removed from the State of Missouri to this State in 1864, a short time before the purchase of the property in controversy. He was surety on a sheriff's bond in Missouri, upon which he was liable for a large amount on account of some default of the sheriff, and this claim was an existing debt against him when the property in controversy was purchased. Shortly after the purchase C. D. Hamilton and Dearing both removed into the house on the lot and continued to reside there for some months, when they had

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some disagreement and Hamilton returned to Missouri, where he has since resided.

There can be no question that the title to the property passed from Williams to some one. It did not pass to Dearing. The plaintiffs aver in the petition that it passed to C. D. and Ann Hamilton. Of this there can be no doubt. But plaintiffs insist that the transaction was a fraud upon the creditors of Dearing, and that therefore the lot should be subjected to the payment of Dearing's debts. This is the material question in the case.

Dearing appears in the case as a witness, and, if we were to accept his testimony as true, there is no doubt that his intentions were fraudulent. But, aside from an impeachment to some extent, his position in the case, to say the least, is not such as to carry with it the highest regard for his credibility. His testimony is far from being in harmony with that of Moss, one of the plaintiffs. He denies generally that he was indebted to C. D. Hamilton, when the conveyance was made.

On the other hand there are two witnesses who contradict him as to his indebtedness to Hamilton. A. H. Hamilton testifies that in October, 1865, Dearing told him that he was justly indebted to C. D. Hamilton in the sum of \$480 or \$485. This conversation is not denied by Dearing.

C. D. Hamilton testifies that Dearing was indebted to him in the sum of \$700 or \$800, and that the property in controversy was conveyed to him to secure his debt. In addition to this we have the fact that Dearing kept possession of the deed, and the fact that both Hamilton and Dearing took possession of, and lived in the house upon the premises, and that in the year 1865 Dearing expended some \$1,300 in improvements upon the lot, and the further fact that Dearing and the plaintiffs herein have been receiving the rents ever since Hamilton removed from the property in 1865.

Taking all these facts into consideration, we think it is clearly established that Dearing was indebted to Hamilton in the sum of about \$480, and that the conveyance was procured by Dearing to be made to Hamilton, by way of security for the debt. We can account for the extensive improvements

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put upon the property by Dearing in no other way. That there was any fraudulent purpose or intent upon the part of Hamilton, or that he had any knowledge of such fraud upon the part of Dearing, we do not think is established by the evidence. At least we may say that nothing appears upon the part of Hamilton further than an intention to secure an honest claim. If this was his honest purpose the transaction is not tainted with fraud, even though he knew that the effect of the transaction was the preference of his claim over that of other creditors.

It follows, therefore, that if Hamilton's claim was a valid one, and he held the property as a security for his debt, the confession of judgment by Dearing, and the sheriff's sale and deed, cannot prejudice his rights or that of his assignees, Shafer and Hearn. They were not parties to the proceedings, and the record title was not in such condition as to mislead the plaintiffs. An examination would have shown the title in Williams and the presumption is that inquiry would have developed the rights of the respective parties.

The cause is triable anew in this court, and the plaintiffs ask that their title be quieted and for general relief.

Our conclusion is that the deed from Williams must be held as a security to Hamilton for his debt, upon the discharge of which the plaintiffs are entitled to a decree quieting title in them. We find the debt to be \$480, with interest at six per cent from October 1, 1865. Upon the payment of this amount, with costs in the court below, the plaintiffs shall have decree quieting title in them. If they fail to make such payment in 90 days from the filing of this opinion, the defendants Shafer and Hearn shall have decree quieting title in them. The defendants to pay the costs of this court.

MODIFIED AND AFFIRMED.

Wadleigh v. Shaw.

WADLEIGH V. SHAW ET AL.

1. **Contract: construction of.** Where a party undertook to cut all the timber upon a certain piece of land, but subsequently and in the same contract it was stipulated that he should not be required to cut any which would cost more than fifty per cent above the ordinary price of cutting, *held*, that the contract did not contemplate the cutting of all the wood unless the average cost should be above the maximum fixed in the contract, but that he was not bound to cut any particular cord of the wood which would exceed the price fixed.

Appeal from Des Moines Circuit Court.

THURSDAY, APRIL 5.

THIS is an action in equity to enforce the specific performance of an agreement to convey real estate. The cause was referred to Hon. P. Henry Smyth, who reported the facts and his conclusions of law. The defendants filed exceptions to the report, which were overruled, and a decree was entered for plaintiff. The defendants appeal.

Hall & Baldwin, for appellants.

Blake & Hammack, for appellee.

DAY, CH. J.—The abstract contains none of the evidence upon which the referee acted. The only question which the 1. **CONTRACT:** record presents for our consideration is one respecting the construction of the contract. The agreement expresses a consideration of \$700, which, it is admitted, the plaintiff has paid. The portion of the contract respecting which the dispute arises is as follows: “And in consideration of the foregoing obligation, the said Samuel Wadleigh hereby agrees and covenants that he will proceed and cut all the timber now standing upon the said tract of land that can be cut into cord-wood and saw-logs; and shall fairly measure, estimate and account for said timber so cut, and shall furnish said Harrison H. Shaw a statement showing the name of each chopper who may chop wood upon said

Wadleigh v. Shaw.

land, and of each teamster who hauls away cord-wood or logs off said land, with the number of cords and logs which each chopper and teamster may so chop and haul. In making said estimate and accounting, said saw or mill-logs shall be estimated at the rate of one and one-half cords of wood for each 1,000 feet of logs, to be measured by scalement. But this agreement shall not bind the said Wadleigh to cut and estimate any timber standing upon said land the cutting of which will cost more than fifty per cent above the customary rates of cutting and chopping. And if the amount of timber so cut and measured and accounted for as aforesaid shall amount to one thousand cords, then the said Samuel Wadleigh agrees and promises to pay the said H. H. Shaw, in addition to the said \$700, the further sum of \$300, and for each and every cord of wood there shall be over and above said 1,000 cords of wood the sum of seventy-five cents. But if said wood so cut and measured fall short and does not amount to said 1,000 cords, then said Wadleigh shall pay no further sum, and the \$700 already paid shall be in full consideration for said deed, the whole of said agreement and covenant on the part of each party to be performed on or before the first day of March, A. D. 1871."

The plaintiff claims that he fully performed this agreement according to its terms; that the amount of timber cut from said land did not aggregate 1,000 cords, by reason of which the \$700 paid is the full consideration of the land. The defendants claim that the actual amount of timber upon said land, at the date of making the contract, for which plaintiff was to pay, was 1,600 cords; and they ask judgment against plaintiff for the sum of \$750 in addition to the \$700 already paid.

The referee found that plaintiff had cut and accounted for about eight hundred cords of wood; that the customary rate of chopping was not above one dollar a cord; that the timber remaining uncut upon the land cannot be procured to be cut at one dollar and fifty cents, or under, per cord; and that, therefore, by the agreement, plaintiff is not bound to have any more timber cut, nor to account further to the defendants.

Wadleigh v. Shaw.

The defendants contend that the true construction of the contract requires the plaintiff to take all the timber together, including the rough and difficult to work, and that, if the whole, when thus taken, could be cut at an average of fifty per cent over the usual rates, or for one dollar and fifty cents per cord, it was plaintiff's duty to cut and account for *all* the timber. This construction is reached by emphasizing that portion of the contract in which plaintiff agreed to cut all the timber now standing upon said tract that can be cut into cord-wood and saw-logs. But it ignores, or at least fails to give proper effect to, the subsequent and qualifying portion of the agreement, which provides that it shall not bind plaintiff to cut and estimate any timber standing upon said land the cutting of which will cost more than fifty per cent above the customary rates of chopping. The defendants insist that there yet remains uncut upon said land timber enough to make about eight hundred cords of wood. The referee finds that no cord of this can be cut for one dollar and fifty cents, or fifty per cent more than the customary price. Yet the construction for which defendants insist would require plaintiff to cut every cord of this, if the average cost of the whole should not exceed one dollar and fifty cents per cord, and would exonerate him from cutting any timber at all, and thus defeat the whole purpose of the agreement, if the average cost of the whole should be greater than one dollar and fifty cents per cord. We are satisfied that the referee adopted the correct construction of the contract.

AFFIRMED.

The Davis Sewing Machine Co. v. McGinnis.

THE DAVIS SEWING MACHINE CO. V. MCGINNIS ET AL.

1. **Contract: vendor and vendee: demand.** Where, by the terms of a contract between vendor and vendee, the purchase price of merchandise was to be paid in cash or the notes of third parties, at the option of the vendee, the indebtedness of the vendee accrued upon the delivery of the merchandise, and a demand for the notes need not be shown to entitle the vendor to a right of action thereon.
2. **Guaranty: indorsement.** Where the guarantor undertook to insure the payment of all indebtedness of his principal to the guaranteee, whether consisting of accounts, notes, indorsement of notes or otherwise, the guarantor was held to be liable upon notes which his principal transferred to the guaranteee, with no other indorsement than simple words of guaranty.
3. **—: not to be extended.** If, under the contract of guaranty, the guaranteee took other or different notes than those provided for in the contract, or gave additional time for payment to the principal, or waived any material condition on which payment was to be made, the guarantor was released from liability.
4. **Evidence: books of account: vendor and vendee.** While the testimony of a witness, in an action upon an account, may not be competent when he shows that his only knowledge of the transaction between the parties was based upon the plaintiff's books of account, yet he may testify to the receipt of orders from the defendant for merchandise and such orders themselves are admissible.
5. **Guaranty: notice by guarantor.** A request by the attorney of the guarantor that a copy of the bond be sent him with authority to sue both principal and guarantor is not such a compliance with section 2108 of the Code as will discharge the guarantor if the guaranteee does not bring the suit within ten days thereafter.

Appeal from Jasper District Court.

FRIDAY, APRIL 6.

ACTION on a written contract, the material portions of which are as follows:

"It is agreed that all sales of sewing machines, parts thereof or accessories thereto, which the Davis Sewing Machine Company, of Watertown, New York, parties of the first part, shall make to John W. McGinnis, of Greencastle, Jasper county,

The Davis Sewing Machine Co. v. McGinnis.

Iowa, parties of the second part, shall be upon the terms and conditions following, unless it shall be otherwise, in writing, hereinafter agreed during the continuance of this contract:

* * * * *

“*Third.* Said Davis Sewing Machine Company will, during the continuance of this agency, sell its machines and attachments to said second party on four months’ time at a discount of 35 per cent from the regular retail prices of the machine and attachments, and agree to accept payment for the same in manner following, to-wit:

“1st. Said party may make a deduction of 15 per cent from net amount of all bills paid in full by cash within thirty days from date of such bills.

“2d. Said Davis Sewing Machine Company will also accept such notes as second party may receive from his customers in payment of any invoice, provided such notes fall due, on an average, six months from date of such invoice.

“3d. Said Davis Sewing Machine Company will accept said second party’s customers’ notes, due, on an average, nine months from date of invoice, in payment of same; provided such notes shall be made with interest at six per cent for all time in excess of six months. Provided always, that all such notes shall be taken on blanks furnished by said Davis Sewing Machine Company, and indorsed and guaranteed by said second party, and shall be made payable at some bank or at the office of some express company.”

* * * * *

Said contract was executed by the plaintiff and McGinnis, and on the back thereof, signed by the other defendants, was the following:

“For value received, I hereby guarantee to the Davis Sewing Machine Company, of Watertown, New York, the full performance of the foregoing contract on the part of John W. McGinnis, and the payment by said John W. McGinnis of all indebtedness by account, note, indorsement of notes or otherwise, which may arise under this contract from said J. W. McGinnis to the said Davis Sewing Machine Company, to the amount of two thousand dollars.”

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The plaintiff also sought to recover of the defendants the amount of certain specified notes, which it was claimed McGinnis had guaranteed and transferred to the plaintiff, under the terms of the contract.

The answer set up the several matters as defenses discussed in the opinion. There was a trial to the court, a finding of facts made, and judgment against McGinnis and in favor of the other defendants. The plaintiff appeals.

Ryan Bros., for appellant.

S. N. Lindley, for appellees.

SEEVERS, J.—I. It is insisted there can be no recovery against the guarantors on the contract, because, under its 1. CONTRACT: terms, any and all indebtedness was payable in vendor and notes guaranteed by McGinnis, and that no demand. vendee: de- mand for the notes has been shown. In this view we cannot concur.

The third clause of the contract fixes the time when the machines are to be paid for, and if the contract stopped there evidently the meaning would be that the indebtedness should be paid in four months in cash. In other words, there was to be a credit of four months. It is then provided that if cash is paid in thirty days from the date of the bills there was to be a certain discount made. So far, it is entirely clear only cash was contemplated. Then follows the further provision that the plaintiff "will also accept such notes as second party (McGinnis) may receive from his customers in payment of any invoice." That is to say, McGinnis might, if he saw proper, pay in notes of a certain description, and plaintiff was bound to accept them. But this option to pay in notes contemplates an offer or tender by McGinnis, not a demand for them by the plaintiff. The latter could not have compelled a payment in notes; why, then, should there be a demand on McGinnis to do what he could not be compelled to perform? Such useless form and ceremony was not required. The indebtedness was incurred by the delivery of the machines, which, under the terms of the contract, could

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be discharged either in cash or notes, at the option of McGinnis. If he failed to do either, plaintiff's right of action was complete without a demand.

II. The guarantor defendants guaranteed the "payment by said John W. McGinnis of all indebtedness by account, ^{2. GUARANTY:} note, indorsement of notes or otherwise." The ^{indorsement.} notes on which plaintiff seeks a recovery of the guarantors were guaranteed by McGinnis, as follows: "For value received I hereby guarantee the prompt payment of the within note." The notes, however, were not otherwise indorsed. But we think what was done was clearly within the defendants' guaranty. It matters not how the notes were transferred, if McGinnis bound himself in any way to pay the same the guarantor defendants were bound to make such contract good. The defendants agreed to pay all indebtedness of McGinnis under the contract, without qualification as to the form or manner McGinnis saw proper to bind himself.

The word "otherwise," as used in defendants' guaranty, taken in connection with what precedes it, must have this broad and general interpretation, and such evidently was the intent of the parties.

III. There were two classes of notes plaintiff agreed to accept, and the payment of these only were guaranteed by the ^{3. — : not to be extend- ed.} defendants. If the plaintiff accepted in payment notes or property not contemplated by the contract the defendants were not bound by the terms of their guaranty to make the same good to the plaintiff, for the amount or value for which the same were taken. The two classes of notes were such as McGinnis might receive from his customers "in payment of any invoice, provided such notes fall due on an average six months from the date of such invoice," or such notes payable in nine months from date of invoice, with interest at six per cent for the time in excess of six months. Three of the notes on which a recovery is sought were payable six months after date, five in twelve and two in nine, as shown by the petition and amendment thereto. The court found "that J. W. McGinnis from time to time took from his customers the following promissory notes in words and figures

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as follows, to-wit:" The abstract then states "(Here is inserted the eight notes set out in petition)," "and turned them over under the contract as and for payment to them to the amount due thereon. But at what time they were thus turned over to plaintiff and received by it does not appear."

It will be seen there were ten notes referred to in the petition and amendment, nine being in the former and one in the latter, while the finding of the court refers to but eight of the notes set out in the petition, but we have no means of determining which of the notes named in the petition are the ones referred to by the court in the finding, as the abstract fails to show that all the evidence is before us. The court below was unable to determine when the notes were turned over under the contract. Under this state of facts it is impossible for us to say that the defendants are liable for the amount of said notes. We are unable to determine that these notes fall within either of the classes defendants bound themselves to pay. It will be remembered the notes were to become due on an average within six or nine months from the date of the invoice. The fact they were payable within those periods does not necessarily show this, and for aught that appears four months from the date of the invoice may have expired before the date of the notes. Nor can we determine as to the average.

The contract contemplates the average time shall not exceed six or nine months on the notes turned over in payment of each invoice. It was not intended that McGinnis should order goods every month for a period of six months, and then on the date of the last order or invoice pay for the whole in notes. If Ely's deposition be taken as true McGinnis ordered on May 4th, 1872, \$118.75 worth of goods; for these an invoice was undoubtedly sent him. Now he could pay for this invoice in the specified notes, and so on as to each invoice. Before the defendants can be held as guarantors of the notes they must be of the character guaranteed. Being sureties they are only bound to the extent of their contract. If the plaintiff took other and different notes than was provided by the contract, or gave additional time to McGinnis in which to make payment, or waived any of the material conditions on which

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payment was to be made, without the knowledge of these sureties, it did so at its peril, and the defendants are not liable.

IV. The defendants moved to suppress the deposition of one Ely on the ground the cross-examination showed that his

4. EVIDENCE: books of account: vendor and vendee. only knowledge was obtained from the plaintiff's books of account, which motion was sustained.

The witness was plaintiff's assistant manager, book keeper and cashier at Chicago, and among other things testified to by him was the state of the accounts between plaintiff and McGinnis. The account was shown by exhibit "F" attached to his deposition, and contained the debits and credits. In his examination-in-chief the witness stated the condition of the accounts in clear and positive terms, and the date of each invoice and the amount or value of the goods sent is clearly stated. On cross-examination the fact was disclosed that all machines and other goods sent McGinnis were so sent in accordance with certain orders purporting to have been given by McGinnis, and such orders were attached to the deposition. The suppression of the deposition had the effect to exclude the orders also. We are unable to see why so much of the account as was based on the orders should have been suppressed. The orders showed the goods and the prices thereof which McGinnis directed to be shipped to him, and constituted very nearly the entire amount of the debit side of the plaintiff's account, and, if proved to have been given by McGinnis, were clearly admissible in evidence, as also was the account based thereon. As to such items the knowledge of the witness was not derived from the books of the plaintiff. The knowledge of the witness as to the credit side of the account seems to have been obtained from plaintiff's books, but it is hardly to be supposed defendants seek to have this suppressed. It was time enough for plaintiff to prove the orders were given by McGinnis when their admissibility was objected to for that reason. The fact that the existence of the orders was first disclosed on cross-examination, we do not deem material, because, if for no other reason, the motion to suppress was not based on the ground that the answers of the witness were not responsive. We know of no rule which will

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not permit a party to avail himself of evidence, though it be elicited on cross-examination.

V. Defendants moved to suppress portions of the answers to interrogatories 6 and 8 in chief in the deposition of Walker, plaintiff's shipping clerk, which motion was sustained. As neither interrogatory 6 or answer thereto is contained in the abstract we have no means of determining whether the court decided the question correctly or not.

Interrogatory 8 and answer is as follows:

"State whether or not any statement of account shows fully how much is due from defendants. If not, state in what else defendants, or either of them, are indebted, and state fully all the transactions between plaintiff and either of defendants.

Ans. I have no way of knowing the balance due. [I only know that said statement of account, marked exhibit F, shows fully and truly the goods and merchandise shipped by plaintiff to defendant, McGinnis, the time when shipped and their value respectively as indicated in said exhibit.]"

The objection made to the foregoing answer was that the portion contained in brackets was not responsive to the question, and on this ground the motion was sustained. In this ruling there was error. The latter clause in the question is quite broad, and a part of the transactions between plaintiff and McGinnis was the shipment of the goods, and this seems to us to be directly responsive to the interrogatory.

On the same ground the defendants moved to suppress the answers to cross-interrogatories 10, 11 and 13. Interrogatory 11 is not in the abstract, and the ruling as to interrogatory 13 was correct.

Interrogatory 10 and answer are as follows:

"Then you do not know that the claim of indebtedness on which plaintiff brings this suit is for goods shipped to him, do you?"

Ans. I only know the fact that the goods mentioned in exhibit F (of Ely's deposition) were shipped by plaintiff to defendant, McGinnis, but what the state of the account is at present, or what balance there may be due, I have no knowledge except what I hear from others."

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That the defendants were disappointed in the answer we can readily conceive, but we think such an answer might have been readily expected. In substance, the witness was asked, do you know the indebtedness on which this suit is based is for goods shipped, and the response is, the goods mentioned in exhibit "F" were shipped by plaintiff to defendant. This answer we think is clearly and directly responsive to the question, and the court erred in sustaining the motion to suppress.

VI. It is urged the guarantors on the bond gave the notice authorized by Sec. 2108 of the Code, and inasmuch as suit 5. GUARANTY: was not commenced in ten days thereafter, or a notice by a guarantor. copy of the contract furnished defendants to enable them to bring suit, it is claimed they are discharged. The following is the notice referred to:

"LAW AND COLLECTION OFFICE OF S. N. LINDLEY,
NEWTON, IOWA, March 9, 1875.

Davis Sewing Machine Co., Gentlemen: You have a bond signed by Ed. G. Fish, Peter Hays, Geo. Meyer and others, indemnifying your company for undertakings of John W. McGinnis, and common justice requires that these men thus bound should have a fair chance to secure themselves against loss. You have some notes aggregating about \$213.33, and which they inform me can be collected if at once attended to, and if they had the proper means they could secure part at least from McGinnis himself. Please send the notes to your attorney for this district for collection. If you have no collector I would endeavor to collect as soon as possible. Also send me copy of the bond with authority to sue the principal and sureties both. This I suggest in behalf of the sureties, so that they may be sued in conjunction with McGinnis, and have an attachment against him, so that we can secure them from loss if possible. Your early attention to this will oblige.

Yours respectfully, S. N. LINDLEY."

Conceding that defendants can avail themselves of this letter written by Judge Lindley we think it does not comply with the statute. There was no request or notice to bring suit, but the plaintiff was requested to send the writer a

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copy of the bond with *authority* to sue both principal and sureties. If this was intended as a statutory notice to sue, no authority was required in addition to a copy of the contract and bond. There was nothing like a request to sue, unless the plaintiffs authorized Judge Lindley to bring the suit. This is a condition that cannot be attached to a notice of this description, nor can there by any other or different condition or qualification than such as is contemplated by the statute. The difference between this notice and that in *First National Bank of Newton v. Smith*, 25 Iowa, 210, is quite apparent.

REVERSED.

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O'NEILL v. THE KEOKUK & DES MOINES R. CO.

1. **Evidence: WAIVER: RAILROADS.** Evidence showing that the employes of a railroad company were accustomed to act in violation of a rule of the company is not admissible to establish a waiver of the rule, unless it be shown that a knowledge of the custom was known to the officer charged with the enforcement of the rule.
2. **Railroads: CONTRIBUTORY NEGLIGENCE.** The employe of a railway company who voluntarily leaves his post and is injured while upon another part of the train where the exposure is greater, is guilty of negligence contributing to the injury, and cannot recover therefor.
3. **New Trial: MISCONDUCT OF JUROR: INTOXICATING LIQUORS.** Where a juror, pending the trial, took a small quantity of intoxicating liquors for medicinal purposes at night, it was *held* that this did not constitute a ground for the granting of a new trial.

Appeal from Lee District Court.

FRIDAY, APRIL 6.

ACTION to recover for personal injuries. The plaintiff's intestate, Maurice O'Neill, was employed as a brakeman on the defendant's train. On the night of October 21, 1874, as the train was passing Comstock Station, without intending to stop, it ran off the track through an open switch and was wrecked. The said Maurice O'Neill had been assigned to the

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duty of handling the brakes at the front end of the train. At the time of the accident, however, he had left his brakes and was riding on the locomotive. He received injuries by being burned and scalded, and from his injuries he died.

The defendant denies all negligence upon its part, and avers that plaintiff's intestate was negligent, and thereby contributed to his injury. Judgment for defendant. Plaintiff appeals.

Miller & Sons, for appellant.

Gillmore & Anderson and *John Fyffe*, for appellee.

ADAMS, J.—I. The defendant introduced in evidence a rule of the company, a copy of which every conductor and brakeman was accustomed to carry, which is in these words: “Rule 37. Conductors and brakemen of all trains meeting or passing, or when approaching or passing a station, must be out and prepared to do anything required for safety or expedition.” The plaintiff, to destroy the force of the evidence, offered as witnesses the engineer of the train and other persons who had been in the employ of the defendant, to prove that it was and had always been the usage and custom of brakemen on the defendant's road to be on the locomotive or in the engineer's cab, as they pleased, when approaching and passing Comstock Station, unless the train stopped there or there was a whistle to call them to the brakes.

The defendant objected to the same as being in conflict with the rule of the defendant introduced, and the court sustained the objection and refused to allow such evidence to be given unless knowledge of the custom should be brought home to the defendant's superintendent. To this ruling the plaintiff excepted, and she now assigns the same as error. The object of the offered evidence was, of course, to show that the rule in question had been waived by the defendant to such extent that it was not a violation of duty on the part of said Maurice O'Neill to leave his brakes under the circumstances of the case and be riding on the locomotive at that time. Without considering whether the rule could be regarded as waived by any less formal or authoritative action than that by which it

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was adopted, it seems clear that it could not be so regarded by reason simply of a custom, on the part of those for whom it was made, to violate it. Acquiescence by the company in the custom of violating the rule should be shown, and this would involve the necessity of showing at least knowledge on the part of the officer or agent charged with the enforcement of the rule that it was customarily violated.

II. At the request of the defendant the court gave an instruction which is in these words:

"No. 3. If Maurice O'Neill was injured while on the engine and in consequence of being on the engine, and if he was ^{2. RAILROADS: contributory negligence.} there voluntarily and in disobedience to the rules of the company requiring him to be at another place, then the court informs you that the servant may not, for his own convenience or comfort, abandon his post except at his own risk; and if said O'Neill voluntarily exposed himself the plaintiff cannot recover in this action, and you must find for the defendant, and you must so find even if you should believe that the accident was caused by negligence of the company or its agents."

The plaintiff excepted to the giving of this instruction, and makes an assignment of error in the following words: "The court erred in instructing the jury that if Maurice O'Neill left the brakes and went to the engine and was killed thereby, plaintiff could not recover." The specific instruction objected to is not pointed out. The assignment of error, therefore, is not as specific as it should be, but we will assume that the plaintiff had reference to the instruction above quoted. The first objection urged in the argument upon this point by plaintiff is that the evidence shows that the locomotive was within a few feet of the opening when it was discovered, and that it was too late to do anything to avoid the accident. If the evidence so shows plaintiff's counsel have unfortunately omitted it from the record. But if such were the evidence we do not think that the instruction would for that reason be wrong. The instruction submitted to the jury the question as to whether O'Neill exposed himself by going upon the engine—that is, whether he increased his peril, and whether

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he was injured in consequence of being there. The evidence shows that he was injured by being burned and scalded. Had he been at his post he would probably have escaped that kind of injury, and might have escaped without injury of any kind.

It is further objected that the court assumed that not being at the brakes was contributory negligence. We do not think that the court could properly have been so understood.

III. The plaintiff moved for a new trial on the ground of newly discovered evidence, and the motion was overruled. The overruling of the motion is assigned as error. In support of such motion plaintiff filed the affidavit of one Breitenstein, who says that he was conductor upon the train. He further says that O'Neill was head brakeman; that his position was on the forepart of the train; that he might ride on the engine, and that he was at his post at the time of the accident.

What he regarded as his post does not fully appear, but it is to be observed that he does not say that O'Neill was at the brakes, and it is to be inferred that he considered him at his post when riding on the engine. He does not state by what authority he was there, or in the discharge of what duty he was there, and his mere opinion as to his right to be there would, we think, not be admissible. Besides, we are of the opinion that no proper diligence was shown to discover the evidence. If there was any question as to where O'Neill was, the circumstances of the accident pointed directly to the conductor as well as to the others in charge of the train as proper witnesses in regard to such fact.

IV. The plaintiff also moved for a new trial on the ground of misconduct of one of the jurymen. The motion was overruled, and the plaintiff assigns the overruling as error. The affidavits, filed in support and resistance of the motion respectively, show, when taken together, that one of the jurors at night, after the adjournment of court for that day, being affected with diarrhoea, took a dose of Jamaica ginger mixed with about two tablespoonfuls of spirits, and that he took about the same quantity the next night for the same purpose, and that the next morning they were sent out to consider the case. They also further

Williamson v. Reddish.

show that he was never at any time under the influence of liquor. It is clear that there was no such misconduct as to afford a reasonable ground for supposing that the plaintiff was prejudiced, and the motion was properly overruled.

Some other errors are assigned, but they are not discussed by appellant's counsel, and must be considered as waived. We discover no error in the rulings of the District Court, and the judgment must be

AFFIRMED.

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WILLIAMSON v. REDDISH.

1. **Receipt: WHAT IS: LOST NOTE.** An instrument given by the payee of a lost note, upon the execution of another note in its stead by the maker, stipulating that if the lost note comes to hand it shall be null and void, is a receipt and may be contradicted or explained by parol evidence.
2. **Promissory Note: RECEIPT: BURDEN OF PROOF.** Where in an action upon a promissory note the defendant introduces in evidence a receipt, the execution of which is admitted, the defendant may then rest, and the burden of explaining the receipt rests upon the plaintiff.
3. _____: _____. Where the plaintiff insisted that, notwithstanding the receipt, there was still due upon the note an unpaid balance, he had the burden of showing that fact and it was error to instruct the jury that the defendant was required after the introduction of the receipt to show that payment had been made of the entire amount due on the note. ADAMS and BECK, JJ., dissenting.

Appeal from Warren Circuit Court.

FRIDAY, APRIL 6.

ACTION upon a promissory note for two hundred dollars and interest. Defense admitting the execution of the note, and alleging the payment of one hundred dollars of principal, and the interest due on the whole note, and the execution of a new note for the remainder. Trial by jury, verdict and judgment for plaintiff for the amount claimed, and defendant appeals.

Williamson v. Reddish.

Bryan & Seavers, for appellant.

Williamson & Parrott, for appellee.

ROTHROCK, J.—I. Sometime after the execution of the original note it was lost or mislaid by plaintiff, and on application to defendant a new note was made. The new note was for one hundred dollars. The plaintiff claims that it was made for one hundred dollars by mistake, and that it should have been for two hundred dollars. The defendant claims that at the time the new note was made he paid plaintiff one hundred dollars principal and twenty dollars interest. The plaintiff denies the alleged payment. At the time the new note was made the plaintiff delivered to defendant a receipt, of which the following is a copy:

“AUGUST 4th, 1869.

“This receipt I give against a lost note that I had against George S. Reddish and James Kenyon, surety to it. If this note ever comes to hand it shall be null and void and of no force. This note calls for two hundred dollars, and was dated August 4, 1868. (Signed.) “ELIJAH WILLIAMSON.”

Counsel for defendant insist that this paper is more than a receipt, that it is a contract and cannot be contradicted by 1. RECEIPT: parol in this proceeding, and they cite *Stapleton what is: lost note v. King*, 33 Iowa, 28, and other cases. We do not think that any of the cases cited support this position, but are united in the belief that there are none of the elements of a contract in this paper further than is contained in a simple receipt for money or the like. The obligation that the lost note shall be invalid is nothing more than would be implied in an ordinary receipt for money in payment of the note.

II. The court instructed the jury *inter alia* as follows:

“2d. The receipt which the defendant has introduced in 2. PROMIS-
SORY note: evidence makes out a *prima facie* case for the receipt:
burden of proof. defendant as to what it recites or sets out, but the same is open to explanation and the burden of explaining the same is upon the plaintiff.”

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"4th. One of the principal matters in controversy in this suit is the alleged payment of \$120, which defendant alleges he paid the plaintiff on the indebtedness now in suit. The burden of showing such payment is on defendant, and if the jury find from the evidence that the defendant paid the \$120 as claimed, then you will allow him a credit for such sum at the day of payment.

"5th. It is claimed by the plaintiff that at the time of the execution of the \$100 note there was a mistake, and that the note should have been for \$200 or more; the burden of proof is on the plaintiff to establish such mistake, if any, by a preponderance of evidence."

Exception was taken by defendant to the fourth instruction. There is no question made as to the second and fifth instructions above set forth, and we believe them to be correct. The plaintiff in his petition alleges the mistake, and of course it was incumbent on him to show it. On the trial the execution and delivery of the receipt were admitted, and the plaintiff could not recover without explaining or contradicting the receipt. Until this be done the defendant need offer no proof; he might stand on the receipt.

This being the attitude of the case before the court, there was error in instructing the jury that the burden was on the defendant to prove the payment of the \$120. This he did by the production of the receipt, more effectually than he could by parol evidence, and there was no necessity for more evidence on his part, and a verdict must necessarily have followed for him, unless the plaintiff could by evidence explain or vary the receipt, consistent with his theory of the case.

The defendant at the trial introduced the receipt and rested. The whole controversy thereafter was an effort on the part of plaintiff to show that the receipt was founded in mistake. While it was technically true that the burden was on the defendant to show payment, yet it seems to us that the court, in the fourth instruction, lost sight of the legal effect of the receipt.

We cannot escape the conclusion that the omission to keep before the minds of the jury the legal effect of the receipt might,

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to say the least, have led them into the mistaken belief that something more was necessary upon the defendant's part, to show payment, than the introduction of the receipt. If the instruction had this tendency to mislead it is erroneous. See *Price v. Mahoney*, 24 Iowa, 582.

As the case must be reversed for this error it is unnecessary to examine the question as to whether the verdict was supported by the evidence.

REVERSED.

ADAMS, J., dissenting.—Where, in an action upon a promissory note, the defendant admits the execution of the note, and pleads payment, and the parties proceed to trial upon that issue, the burden is upon the defendant to prove the payment. If, in the progress of the trial, the defendant introduces in evidence a receipt of payment, the execution of which is admitted, the defendant may then rest, the burden being shifted to the plaintiff to so explain the receipt as to destroy its force. So far there cannot, of course, be a difference of opinion. Yet, I think that the instructions given by the Circuit Court do not differ in substance from the foregoing statement. Perhaps the majority of the court would so concede, but they think that they are susceptible of another meaning.

The court instructed the jury that the burden of proving payment was on the defendant. This was true, if the court had reference to the case as it stood at the commencement of the trial; it was not true, if the court had reference to the case as it stood after the introduction of the receipt. The majority of this court think that the Circuit Court might have been understood as having reference to the case as it stood after the introduction of the receipt. But, it should be observed that in the second instruction the Circuit Court expressly charged the jury that the introduction of the receipt made a *prima facie* case for the defendant, and imposed upon the plaintiff the burden of explaining the receipt. It will be seen that the legal effect of the receipt is expressed in language that is unmistakable. In the majority opinion this is not denied, but it is said that the jury might have been misled by the omis-

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sion to keep the legal effect of the receipt before their minds. Omission to repeat an instruction cannot, I think, be regarded as ground for reversal.

Again, where a jury is instructed that the burden of proof is upon the defendant it is to be understood that the court refers to the issue as made by the pleadings, unless there is something to indicate that the court refers to the status of the case at some particular point in the progress of the trial. In this case there is, to my mind, not only no such indication, but the idea seems to be precluded. To suppose that the court referred to the status of the case after the introduction of the receipt would involve a palpable contradiction of terms. Under such a construction of the instructions the jury must have understood the court as saying in substance that although the introduction of the receipt made a *prima facie* case for the defendant, still the burden of proof remained upon the defendant, and he could not succeed without additional evidence. If we suppose the jury so understood the court we must suppose that they were ignorant of the meaning of the language used; but as that is free from ambiguity or obscurity such a supposition is not allowable.

Mr. Justice BECK concurs with me in this dissent.

JENKS v. OSCEOLA TOWNSHIP.

1. **Garnishment: MUNICIPAL CORPORATION.** The rule that municipal corporations shall not be garnished is not limited to cases where it would interfere with the discharge of corporate duties but is universal in its application.
2. —— : —— : **PRACTICE.** An objection based upon the exemption of municipal corporations from garnishment need not be made before the commissioner, but will be in time if raised when the answer is filed.

Appeal from Clarke Circuit Court.

FRIDAY, APRIL 6.

THE defendant was garnished as the supposed debtor of one Densmore. At the next term of court, and on the 14th day

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of February, 1876, a commissioner was appointed to take the answer of the defendant as such garnishee. On the 22d day of February the commissioner filed the answer of the garnishee. It was admitted that the defendant was indebted to said Densmore in the sum of three hundred and sixty dollars. On the 24th of February the defendant filed a motion to discharge the attachment and quash the levy of the writ of attachment so far as the garnishment of the defendant was concerned, on the ground that defendant was a municipal corporation and, therefore, not subject to garnishment, which motion being sustained the plaintiff appeals.

S. P. Ayres and Chaney & Temple, for appellant.

Wilson & Stephens, for appellee.

SEEVERS, J.—Both parties have treated defendant as, and thereby practically conceded it to be, a municipal corporation,

1. GARNISH-
MENT: munici-
pal corpora-
tion. capable of suing and being sued, and we shall consider the question for determination as it has been presented by counsel. The Code provides that “a municipal corporation shall not be garnished.” Sec. 2976. It is insisted that it was not intended to exempt municipal corporations from the process of garnishment in all cases but only to an extent sufficient to protect them against embarrassment in the execution of their political, civil or corporate duties. But the exemption applies to all cases, and if the intent had been as counsel claim the general assembly should have so provided. Instead of so doing, in plain and concise language it has been provided that such corporations shall not be garnished. What warrant is there for interpolating into the statute conditions and exceptions? None, we think. On the contrary there are good reasons why this should not be done. If the construction claimed by counsel should prevail, then, instead of every case turning upon the language of the statute, the inquiry would be, does the particular garnishment interfere with the political, civil or corporate duties of the defendant? if so, how seriously will it be embarrassed? and these questions must be determined by

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jurors under instructions of the court. We cannot sanction such a construction.

II. It is urged that such corporation may waive the exemption, and it was so held in *Clapp v. Walker & Davis*, 25 Iowa, 315. In that case there were two trials in practice. the court below. The corporation did not, by either motion or answer, raise the question of its liability to the process of garnishment. Nor was any question raised on the first trial as to its non-liability to be garnished. A motion was filed for a new trial, which was granted, but the question as to the exemption of the corporation was not a ground of such motion. On the second trial the corporation asked the court to instruct the jury it was not liable to such process, which was refused, and this court held there was no error because there was no such issue before the jury. The present case is very different. A commissioner having been appointed to take the answer of the defendant as to its indebtedness to the principal defendant, it is insisted that the exemption should have been claimed before him. It is true the defendant might have so claimed, but the commissioner had no power to determine this question, and, had there been a refusal to answer touching the indebtedness, it is possible the defendant would have been in default. But, however this may be, the answer made before the commissioner was proper and such as was contemplated by his appointment. Upon the filing of the commissioner's report, and at the same term of court, the defendant raised the question as to its liability under the law. This was sufficient as to time, and it was the proper place and there was no waiver.

AFFIRMED.

Crosley v. Calhoon.

CROSLEY V. CALHOON ET AL.

1. **Administrator: ORDER OF PROBATE COURT: ESTOPPEL.** An order of discharge of an administrator does not amount to an adjudication that an heir of the intestate, whom the administrator reported that he was unable to find, is in fact dead, nor will it estop such heir or his creditors from claiming his distributive share of the estate.
2. ——: EVIDENCE: ADMISSIBILITY. An authenticated copy of a confession of judgment in another State by the heir was *held* to be admissible in an action to recover his share from the other heirs, among whom the estate had been distributed.

Appeal from Page Circuit Court.

FRIDAY, APRIL 6.

On the 17th day of April, 1875, the plaintiff commenced an action against James Calhoon upon a judgment recovered in the District Court of California, against said James Calhoon, for the sum of six hundred and seventy-five dollars, and interest at the rate of ten per cent, and ten dollars costs, all payable in gold coin of the United States. The petition alleged the non-residence of the defendant, and asked a writ of attachment which was served by garnishing John, Alexander and David Calhoon. The garnishees answered that they were not indebted to the defendant in the principal suit, and that they had no property of any kind in their possession or under their control belonging to him. The plaintiff controverted the answers of the garnishees. The issue joined was tried by the court, and judgment was rendered against each of the garnishees for the sum of \$302.77 and costs. The garnishees appeal. The material facts are stated in the opinion.

Wm. McPherrin, for appellants.

N. B. Moore and Barcroft, Given & Drabelle, for appellee.

DAY, CH. J.—On the 9th day of December, 1870, James Calhoon confessed a judgment in the District Court of Cali-

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fornia, for Sacramento county, in favor of plaintiff for the sum of \$675, interest and costs. The evidence clearly establishes that James Calhoon, who confessed this judgment, is a son of George Calhoon, and brother of the garnishees. George Calhoon departed this life on the 14th day of December, 1872, intestate, and on the 7th day of January, 1872, John Calhoon, one of the garnishees, was duly appointed administrator of the estate. On the 20th day of April, 1873, the administrator filed a report, in which the following statement occurs: "He further represents that the children of the decedent are Eliza Calhoon, now intermarried with John Coffey in Ohio, David Calhoon, Alexander Calhoon and John Calhoon, living in Page county, Iowa, and James Calhoon who is supposed to be dead without issue for the following reasons, viz: that about twenty-three years ago he left his father's home, in Ohio, after receiving advancements, and went to the State of California, since which time the friends have had no word from him, excepting at one time, and that was more than seven years ago. The administrator has made diligent inquiry since his appointment to find some tidings concerning the said James, but without avail."

On the 5th day of June, 1874, the administrator made his final report. In this report he shows that he had paid to the children and heirs of the deceased the following sums: to David, \$500; to Eliza, \$1,739.05; to Alexander, \$1,915; to himself, \$975, making to each one, in connection with advancements received from their father in his lifetime, the sum of \$3,015. This report renews the suggestion as to the absence and supposed death of James, states that there is on hand for distribution the sum of \$1,730.47, asks that the administrator be allowed to distribute this sum among the four heirs known to be living, and that, upon the filing of the receipt of each one for the one-fourth part thereof, he be discharged from further trusts and liabilities. On the 29th day of June the administrator filed the receipts of David and Alexander Calhoon, and of himself, for the sum of \$432.65, in full of their respective balances of the distributive share of said estate. The administrator gave due notice by publication that at the

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June Term, 1874, of the Page County Circuit Court, he would submit his final report and ask to be discharged. At said term the Circuit Court made the following order: "The final report of the administrator, John Calhoon, is now examined and approved, and it appearing to the court that said administrator has made full settlement of said estate, paid all claims, and made distribution as provided by law, he is, therefore, discharged."

I. It is claimed, by appellants, that this order of the court amounts to an adjudication that James Calhoon was dead at

1. ADMINISTRATOR: OR-
DER OF PROBATE: COURT:
PEL. the date of the decease of his father, and that it is binding upon James Calhoon and his creditors as *res adjudicata*. The probate jurisdiction of the Circuit Court is conferred by section 2312 of the Code, which is as follows: "The Circuit Court of each county shall have original and exclusive jurisdiction of the probate of wills, and the appointment of such executors, administrators, or trustees as may be required to carry the same into effect; of the settlement of the estates of deceased persons, and of the persons and estates of minors, insane persons, and others requiring guardianship, including applications for the sale of real property belonging to any such estate, except as prescribed in chapters one and three, of title fifteen.

The appellee insists that neither in this section nor elsewhere is any jurisdiction conferred upon the probate court to determine who are entitled to distributive portions of an estate; citing *Granger v. Bassett*, 98 Mass., 462; *McLaughlin v. McLaughlin*, 4 Ohio St., 508; *Sherwood v. Wooster*, 11 Paige, 449, and other cases.

Without determining whether or not, in any event, the Circuit Court as a court of probate has jurisdiction to determine who are heirs of an estate and entitled to distribution, we are clearly of opinion that the order made in this case does not estop James Calhoon, nor his creditors, from insisting that he was, at the time of the intestate's death, an heir and entitled to a share of the estate. The order was made simply upon an application of the administrator, for the approval of his report, and his discharge from further trust and liability.

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No notice of the application was given to James Calhoon, for the whole proceeding was conducted upon the theory that he was dead, without issue.

The jurisdiction of the court, if any such it has, was not invoked for the purpose of determining who were, or were not, heirs of the decedent. No such question was submitted to the court for determination, and it cannot be claimed that any such question was determined. The most that can be claimed for the order is, that, if the administrator has acted in good faith, without fraud or concealment, he is exonerated from further liability to the heirs. The heirs, who are recognized as such in the administrator's report, received the sums paid to them provisionally. If other heirs appear and establish their claim to a distributive share the heirs who have received the whole estate must account for the sums received above their proper share. The judgment of the court in this case recognizes the binding effect of the order discharging John Calhoon, and holds him equally liable with the other garnishees, for enough of the share of James Calhoon to satisfy the plaintiff's judgment. The court below gave to the order of discharge all the effect to which it is entitled.

II. The plaintiff introduced an authenticated copy of the confession of judgment of James Calhoon in favor of plaintiff, dated December 9th, 1870. The defendants objected to the introduction of this evidence and assign the admission of it as error. It is claimed that it cannot be received as evidence against the defendants that James Calhoon was alive at the time. If James Calhoon had written a letter of that date, and the handwriting had been fully identified, it would be competent evidence that he was alive on that day. The execution of the confession is fully proved, and that it is competent evidence we entertain no doubt. But, even if it were not competent the admission of it is error without prejudice, for it is fully proved by independent testimony that James Calhoon was alive on the day this confession purports to have been made.

III. It is claimed that there is no proof that James Calhoon was alive when his father died. The answer to this is

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that there is no proof that he was then dead. He was alive on the 9th day of December, 1870, two years before the death of his father. There is no legal presumption that he died in the mean time. The record discloses no error.

AFFIRMED.

CALLANAN v. THE COUNTY OF MADISON.

45	561
118	585

45	561
d141	562

1. **Statute of Limitations: TAXES ERRONEOUSLY PAID.** A cause of action for the recovery from the county of taxes illegally assessed, and paid in ignorance of that fact, accrues at the very moment of payment, and the action is barred after the lapse of five years from that time.
2. _____: _____. It is not necessary that the tax be adjudged to be illegal before the cause of action shall accrue.

Appeal from Madison Circuit Court.

FRIDAY, APRIL 6.

ACTION to recover for money paid in the purchase of certain lands sold by the treasurer of Madison county in 1864 for the taxes of prior years. The tax sale was made to plaintiff's grantor, and it has been found that the lands were not subject to taxation. The defendant, in its answer, sets up that the title acquired by plaintiff under the tax deed was or has become valid, and pleads, as a further defense, that the action is barred by the statute of limitations. The cause was submitted to the court without a jury, upon an agreed statement of facts, and judgment was rendered for defendant. Plaintiff appeals.

Barcroft, Given & Drabelle, for appellant.

Byram Leonard, for appellee.

BECK, J.—I. The land was sold for taxes in 1864; the action was commenced in 1874. We are first required to determine whether plaintiff's claim is barred by the statute of limitations. Actions of this character are barred in five years from the time the

1. STATUTE OF LIMITATIONS: TAXES ERRONEOUSLY PAID.

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causes thereof accrued. Code, § 2529, par. 4. When did plaintiff's cause of action accrue?

Plaintiff bases his right to recover upon Rev., § 762 (Code, § 870), which provides that, "In all cases where any person shall pay any tax, interest or costs, or any portion thereof that shall thereafter be found to be erroneous or illegal, * * * * * the board of supervisors shall direct the treasurer to refund the same to the tax payer."

The cause of action accrues under this provision at the very moment of payment of the taxes, if at that time the tax paid was erroneous or illegal. The right of the plaintiff and liability of the county do not depend upon future acts to be done or suffered by either—their relation as creditor and debtor is fixed by the illegality of the tax. If it be illegal or erroneous plaintiff has a right of action at the very time of payment, for the county had no right to receive the money and held it from the first subject to plaintiff's claim. The proposition, to our minds, need but be stated to receive assent.

II. Plaintiff's counsel, however, insists that under the language of the section above cited some affirmative act must 2. —: —. be had to fix the time at which plaintiff's right of action accrued. They rely upon these words of the statute, viz: "When any person shall pay any tax * * that shall, thereafter, be found to be erroneous or illegal," etc. They insist that the tax must be *found* to be illegal or erroneous. By this they mean that the error or illegality must be adjudged to exist, in some proper proceeding. As the illegality of the tax in question was not so adjudicated until within five years of the commencement of the action, recovery is not barred. But no such meaning can be attached to the language. If such had been the legislative intention words would have been used capable of such an interpretation. Those before us are not. The meaning of the language is clearly this: the supervisors shall, when it appears that the tax was erroneous or illegal, direct the treasurer to refund the same. It is used to prescribe the duty of the board of supervisors, and requires them to exercise investigation and official action to determine the fact of the county's liability. It can-

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not be claimed that no liability existed before such action. The supervisors are to ascertain the liability, and when it is found by them are to order payment to be made in discharge thereof. If they find the liability, it must have had an existence; if it existed, plaintiff's cause of action also existed. The cause of action accrued when the liability first had an existence, and, as we have seen, that was the moment the money was paid for illegal or erroneous taxes.

If plaintiff's cause of action did not accrue, according to plaintiff's view of the case, until the illegality or error in the tax had been adjudicated, these results would have followed: 1. His cause of action would not accrue until he brought an action to recover the lands. This he has not done. His action has not accrued, and therefore he cannot recover, for no man can recover on a cause of action that has not accrued. 2. Or his cause of action would not accrue until after an action for the taxes is brought. But here is the same result, he cannot recover in such action because his cause of action has not accrued. 3. Or he must bring an action without a claim to recover, in order to settle the legality of the tax. But the law will not countenance such unnecessary multiplication of suits. 4. The action to determine the legality of the tax may be brought by another plaintiff against the county, or in a suit between other parties the question may be determined. But the plaintiff in the first case, and both the plaintiff and defendant in the second, would not be bound by such proceedings. The absurd results in all these cases show the unsoundness of plaintiff's position.

We conclude that plaintiff's action was barred by the statute of limitations.

The conclusion we reach renders the determination of the question involving the validity of the title acquired by plaintiff under the tax sale and deed unnecessary.

The judgment of the Circuit Court is

AFFIRMED.

Snell v. The City of Fort Dodge.

45 564
108 36645 564
119 7845 564
124 51645 564
125 25845 564
138 367

SNELL V. THE CITY OF FORT DODGE ET AL.

1. **TAXATION: ASSESSMENT: MANNER OF.** Where the assessor employed another to make the valuations of property, which were afterwards submitted to him for correction and approval, the assessment thus made was held not to be invalid.
2. —— : —— : **LEVY.** An assessment upon the property in question having been made in 1869, and afterwards, during the same year, the town in which the property lay having become incorporated as a city, it was the duty of the auditor to base the levy for 1870 upon the assessment for 1869.
3. —— : **EQUALIZATION OF TAXES.** The books of assessment will be presumed, in the absence of a showing to the contrary, to be in possession of the board of equalization on the first Monday of May, when it is the duty of the taxpayer to appear if he has reason to complain of the assessment.
4. —— : **INTENT TO LEVY: MUNICIPAL CORPORATION.** Where a motion to "levy a tax of one per cent upon the taxable property" of a city was carried in its city council, and the clerk duly certified to the auditor that such a levy had been made, it was *held* that the action of the council amounted to a present levy, and that the tax thereunder was a valid one.

Appeal from Webster Circuit Court.

WEDNESDAY, April 17.

ACTION in equity to restrain the collection of city taxes on certain real property belonging to the plaintiff, situate within the corporate limits of the defendant, on the grounds, as stated in the petition: 1. That there never was an assessment made by an assessor elected or appointed by the city, and returned as provided by law, on which to predicate a levy. 2. That the city council never caused the levy to be certified to the board of supervisors as provided by law. 3. That the county auditor on his own motion and without authority of law placed said levy on the tax lists and determined the tax upon said property from the valuation of the township assessor, made in 1869. 4. That no taxes were levied by the council of said city.

The answer denies the material allegations in the petition,

Snell v. The City of Fort Dodge.

and defendant insists there was a valid assessment and levy and the substantial requirements of law complied with.

There was a reference and a finding that there was no valid assessment, and the taxes illegal and void. This finding was confirmed by the court, a decree accordingly entered and defendants appeal.

Frank Farrell and John Garaghty, for appellants.

Theo. Hawley, for appellee.

SEEVERS, J.—The defendant was duly incorporated as early as the 2d day of December, 1869, on which day the council held their first meeting. On May 2, 1870, an assessor was appointed by such council, and on the 16th day of said month he duly qualified as such.

Previous to the incorporation the territory embraced in the city limits formed a part of Wahkonsa township, and the said assessor in listing and assessing the property in the city copied from the assessment made in said township for 1869, and in no other way or manner was the value of the property ascertained.

One Smith was the duly elected and qualified assessor for said township in 1869, and all the entries in the assessment book for said year are in the handwriting of Thos. Sergeant. The latter made the assessment, wrote up the book, which was regular on its face, and properly returned and filed. Attached thereto and forming a part thereof was the following return:

“STATE OF IOWA, } ss.
Webster County. }

“I, James D. Smith, assessor of Wahkonsa township, in said county, do hereby certify that the values of all the real and personal property, moneys and credits, required to be listed for taxation by me, is truly returned and set forth in the annexed list, and that in every case I have diligently and by the best means in my power endeavored to ascertain the true amount and value of all taxable property, moneys and credits,

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and as I verily believe the full value thereof, estimated by the rules prescribed by law, is set forth in the list aforesaid; that in no case knowingly have I omitted to assess any property which by law I am required to assess, nor have I connived at any violation or evasion of any of the requirements of the law in relation to the listing or valuation of property, moneys or credits of any kind for taxation.

"Given under my hand the 7th day of June, 1869.

JAMES D. SMITH,
Assessor of Waukonza Township."

Sergeant was employed by the assessor and made the valuations of property, but submitted the same to the assessor from time to time for approval.

Under the facts above stated it becomes necessary to determine:

I. Whether the assessment made in 1869, by the township assessor, was legal and valid. We are of the opinion it was.

1. **TAXATION:** It is immaterial by whom the clerical duty of listing the property was done, for in no manner could that affect the taxpayer injuriously. It is true that Sergeant fixed the values of the property in the first instance, but the assessor had a supervision over his work, examined it from time to time, and finally adopted it as his act. Conceding that the taxpayer is entitled to have the best judgment of the legally elected assessor in determining the value of his property, it by no means appears that he has not had such judgment exercised. It is not pretended that the judgment of the assessor was in any manner influenced by what was done by Sergeant. The statute does not undertake to specify in what way or manner the assessor shall determine the value of the property to be assessed; and, in the absence of fraud, or evidence tending to show any prejudice or wrong to the taxpayer, we are unable to say the assessment made was a nullity. If the assessor has exercised his judgment and arrived at a conclusion, we cannot say that the means or measures taken to inform himself upon the subject matter within his jurisdiction were improper and illegal. Should we do so we

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would be usurping the office and performing the duties of assessors.

II. Having ascertained that the assessment of 1869 was legal and valid and the plaintiff's property duly and legally assessed at that time, it becomes necessary to determine whether another assessment was necessary in 1870, and, if so, whether the one made was legal.

Under the law as it then existed, and is still in force, there could be no new and independent valuation and assessment of real property made by the assessor in 1870, except as to such as had been omitted in 1869. If the assessor elected or appointed in 1870 had undertaken to assess and place a different value on real property from that fixed in 1869 such act would have been without authority of law, and a levy of taxes based thereon, we incline to think, would have been of doubtful propriety, if not void. As to such property it is a matter of grave doubt whether the assessor had anything to do therewith. As a matter of convenience he might list it, but he was not required to do even this; but, when the county auditor made out the tax-books for that and all other evenly numbered years, it was his duty to make up the proper list from the books of the previous year, so far as all real property that had been assessed and taxed during that year was concerned, and calculate the taxes thereon, based on the values as fixed and determined by the books in his office. Rev., Secs. 719, 720; Code, Sec. 812; Chap. 138, Sec. 2, Laws of the Twelfth General Assembly. Such being true, it was wholly immaterial how, when, or in what manner the assessor of 1870 performed his duties, provided the levy was based on the assessment of 1869, and the amount of taxes ascertained by calculations based on the values fixed by such assessment.

III. It is urged that the plaintiff and other taxpayers were deprived of the right to appear before the board of equalization of taxes, which at that time was composed of the township trustees, and they were required to meet for the performance of that duty on the first Monday in May. Chap. 89, Laws of the Thirteenth General Assembly. The argument of the appellee is based on the assumption that

Snell v. The City of Fort Dodge.

as the assessor of 1870 did not qualify until after the first Monday in May the board of equalization could not have had before them the assessment made by him. But as such assessor had no duty to perform as to real property assessed in 1869, and could not under the law assess the same, the assumption is not legally correct. The assessment of 1869, together with all corrections made therein by the board of equalization of that year, if any such there were, in the absence of any showing to the contrary must be presumed to have been in existence and in the custody of the county auditor at the time fixed by law for the meeting of such board in 1870. Such books are public records, open to the inspection of all. There is no showing made whether or not the board met on the appointed day, but the presumption is, and must be under such circumstances, that they performed their duty at the proper time required by law. It must be further presumed, in the absence of any showing to the contrary, that such board had before them the proper books and papers to enable them to perform their duties. Such being the case, the plaintiff was not deprived of the opportunity of having the assessment of his property corrected, and he was not, therefore, deprived of any substantial right.

IV. On the 4th day of April, 1870, "Fessler (a member of the city council) moved to levy a tax of one per cent on the taxable property of the city of Ft. Dodge. Motion prevailed," and on September 26, 1870, the clerk of said council duly certified to the county auditor the fact that such a levy had been made. It is objected that the foregoing does not constitute a present levy, but only an intention to make such a levy at some future day. In this view we do not concur. The intent is clear and apparent and amounts to a present levy. *West v. Whitaker*, 37 Iowa, 598. Conceding it to be true that the clerk of the council certified the fact of such levy to the county auditor without the positive direction of the council, this would not be such an irregularity as will authorize an injunction restraining the collection of the taxes. *Iowa Railroad Land Co. v. Carroll County*, 39 Iowa, 151. Even if it be admitted

Paine v. The C., R. I. & P. R. Co.

that at the time of the levy no full and complete assessment had been made and returned, this would not be sufficient to warrant us in declaring the taxes void and restraining their collection by an injunction. *Parsons v. Childs*, 36 Iowa, 108. Statutes fixing the time of levying taxes will be deemed directory unless the taxpayer by reason thereof will sustain some substantial injury. *Hill v. Wolfe*, 28 Iowa, 577; *Easton v. Savery*, 44 Id., 654.

For the reasons stated the decree of the Circuit Court will be reversed, and a decree entered in this court, if counsel for appellant so elect, in accordance with this opinion.

REVERSED.

PAINÉ v. THE C., R. I. & P. R. CO.

45	569
493	787
45	569
123	483

1. **Railroads: THREAT TO EJECT PASSENGER: PUNITIVE DAMAGES.** A mere threat by a conductor to eject a passenger from a train unless the passenger shall pay a small amount in addition to the regular fare because unprovided with a ticket, even though he had tried to procure the ticket and found the ticket office closed, does not entitle him to punitive damages.
2. ——: ——: MEASURE OF DAMAGES. In such a case, where no malice or wantonness appeared on the part of the conductor, the passenger would be entitled to recover the amount paid in excess of the regular fare, with interest.

Appeal from Jefferson Circuit Court.

TUESDAY, APRIL 17.

THE plaintiff, wishing to take passage on defendant's cars from Eldon to Fairfield, Iowa, applied for a ticket at the ticket-office at Eldon, but was unable to obtain one, the ticket agent being absent. He then took a seat in defendant's cars, and tendered to the conductor as fare the price usually charged for a ticket. The conductor refused to accept the same and demanded ten cents more, being the excess usually charged to passengers who neglected to procure tickets and

Paine v. The C. B. I. & P. R. Co.

paid on the cars. The plaintiff objected to paying it, but finally did pay it, being induced to do so by a threat of the conductor to stop the cars and put him off. This action is brought to recover for the ten cents, and also for damages alleged to have been sustained by reason of the discomfort and insult. Other facts are stated in the opinion. Verdict for plaintiff for \$250. Defendant appeals.

Thomas F. Withrow, for appellant.

McCoid & Heron, for appellee.

ADAMS, J.—I. At the time the plaintiff applied at the ticket office for a ticket two other persons, one Boerstler and one Russell, applied also for tickets. The three took seats in the cars together. The conductor first came to Boerstler and asked him for his fare and Boerstler tendered the price of a ticket which the conductor refused to accept unless he should pay ten cents more. Thereupon Boerstler explained to the conductor the reason why he had no ticket, and the conductor insisted, notwithstanding the reasons given, upon his paying the extra ten cents, and informed him if it was not paid he should stop the cars and put him off the train. Boerstler then paid the full amount demanded. The conversation between the conductor and Boerstler was heard by the plaintiff. When the conductor asked him for fare he re-stated what Boerstler said. What occurred between the plaintiff and the conductor may be given in plaintiff's own language. He said: "I objected to paying it, and told him we tried to get tickets and the office was closed and it was impossible to get one; he was very firm and positive, and I thought he was a little excited; I told him that was not business to have a ticket office closed and then ask for more; then he said he did not want to hear any more rigmarole; he said I would have to pay or get off the train; he said he guessed they knew their business; he said I should pay it or he would stop the train and put me off; he said he did not want to go over that rigmarole again, that I had heard what he said to Mr. Boerstler; I wont say positive but I think he was a little excited; he didn't use any

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violence; I felt humiliated that the man had power over me; I should judge there were some fifteen or twenty in the car; I listened to hear all I could of the conversation between the conductor and Boerstler; when he came to me I offered him seventy cents, and he said he would have to have ten cents more; I am sure the conductor was a little excited, and not only so, but he was a little insulting; then I undertook to reason with him and he said he did not want any more rigmarole out of me, because, he said, I heard his conversation with Boerstler; his insolence was in saying that he guessed they knew their business; I might have been a little excited; I did not insult him; I think he was a little insulting; he didn't offer me any violence, not physical; he said he did not want to hear anything more from me, but the dime he was going to have; I don't think he used profane language; he didn't touch me; I got home safely on that train, and didn't meet any accident; I did suffer some in mind; you can judge how a man would suffer; I should say there were fifteen or twenty on the train."

Upon the facts as above detailed the court gave the jury an instruction which is in the following words:

"7. If you find for the plaintiff under the foregoing instructions, you will allow him such damages as will sufficiently 1. RAILROADS: compensate him for the injury he sustained, and threat to eject passenger: if you find from the testimony that the wrongful punitive damages. act was done in a spirit of oppression, malice or wantonness, you may add to such compensatory damages such exemplary damages as, from all the circumstances, you may deem just." To the giving of this instruction the defendant excepted.

Whether, in case the wrongful act of the conductor had been malicious or wanton, the plaintiff would be entitled to exemplary damages as against the company, there being no evidence that the company was guilty of malice or wantonness, or was in fault in employing such a person as conductor, we need not determine. The defendant objects to the instruction upon the ground only that the evidence does not show malice or wantonness, and we think that the objection is well taken.

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While the defendant could not, under the circumstances, properly demand more than the ticket rate (see *Jeffersonville R. R. Co. v. Rogers*, 38 Ind., 116), we are unable to discover in what the conductor said or did anything more than an intention to discharge his duty to his employer. The firmness which he exhibited was only such as probably seemed to him necessary in the discharge of such duty. It was held in *State v. Chovin*, 7 Iowa, 204, that the rule of railroad companies requiring passengers who do not procure tickets to pay a small extra amount, is reasonable and proper. The rule can be enforced, so far as we can see, only through the conductors. And we do not see how they could properly be vested with a discretion to waive it upon the mere statement of passengers that they had been unable to procure tickets. Such a discretion would render the rule, we think, substantially nugatory. At all events there is no evidence that the conductor in this case had been vested with such discretion. If not, there is no evidence of malice or wantonness on his part. He had no means of enforcing the rule, except to stop the train and put the plaintiff off. This, it seems, he threatened to do, and repeated the threat, and used some other language about it. But this, to our mind, shows a desire on the part of the conductor to avoid being subjected to the necessity of putting the plaintiff off if he could discharge his duty without it. Had he stopped the train and put the plaintiff off immediately upon his refusal to pay, his conduct would have been less justifiable. Yet, even then the company would not necessarily have become liable for exemplary damages. In *P., Ft. W. & C. R. R. Co. v. Slusser*, 19 Ohio St., 157, the defendant in error was wrongfully ejected from one of the plaintiff's cars, but no more force was used than necessary, and the defendant received no material bodily injury, nor was he in any respect insulted otherwise than by the act done. The court instructed the jury that "if they found the conductor acted maliciously in ejecting the plaintiff (defendant in error) from the car, they were at liberty to award punitive damages for the sake of the example." It was held that, however correct the instruction

Paine v. The C., R. I. & P. R. Co.

might have been as an abstract proposition, it was uncalled for and tended to mislead the jury.

In *Hamilton v. Third Avenue R. R. Co.*, 53 N. Y., 25, the plaintiff was wrongfully ejected from the defendant's car. It was held that punitive damages were not allowable, there being no evidence that the conductor acted otherwise than honestly. If, therefore, the actual expulsion of a passenger from a railway car, although wrongful, is not such evidence of malice or wantonness as will entitle the passenger to exemplary damages, the mere threat to do it cannot, for a still stronger reason, be so considered.

II. It is objected by the appellant that the verdict is excessive. We are of the opinion that this objection is also well taken. We have no doubt that in a proper case damages may be recovered as compensatory for injury to the feelings. We so held in *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 314; but in the present case we do not think that damages for injured feelings are recoverable. If the conductor was not guilty of malice or wantonness, but was conscientiously endeavoring to carry out a wholesome rule of the company, as we must assume in the absence of all evidence to the contrary, the plaintiff had no occasion to be injured in his feelings. He should have appreciated that so far as the conductor was concerned the difficulty arose from one of those complications in his business for which he was not responsible.

So far as the company was concerned, it is enough to say that no insult was intended to the plaintiff by them. This the plaintiff well knew. It is possible that a better rule might have been devised, or some means adopted to guard against the occurrence of such a difficulty as has arisen in this case, but, even if this were so, we should regard the occurrence as the result of mere oversight. It would involve nothing of personal affront, and we cannot regard the plaintiff's injury as extending beyond the loss of money wrongfully exacted. This, doubtless, he is entitled to recover with interest. If it be said that such a remedy is equivalent to no remedy, it may be replied that it is not the fault of the law, but of the case. We

Davies v. Huebner.

cannot allow more than compensation because mere compensation, when obtained, would prove to be less than the cost of obtaining it. As we discover nothing in the circumstances of this case by which the plaintiff as a reasonable man should have been injured in his feelings, we think his recovery must be limited to his pecuniary loss. It follows that the verdict was excessive and the judgment must be

REVERSED.

DAY, CH. J.—I concur in the foregoing opinion, but not in the statement that compensatory damages may be awarded for mere injury to feelings.

45	574
80	88
45	574
81	221
45	574
84	350
45	574
86	888
45	574
89	190
45	574
93	200
45	574
97	602
99	653
45	574
106	888
45	574
110	251
45	574
111	421
45	574
113	543
45	574
114	475
45	574
119	887
119	689
45	574
138	432
138	433

DAVIES v. HUEBNER.

1. **Highway: EFFECT OF NON-USER.** Where a highway has been established by the proper legal authority, although never actually opened, mere non-user for a period of ten years will not operate to defeat the right of the public therein, where there has been no adverse use of the land.
2. ——: **ADVERSE POSSESSION: ESTOPPEL.** Where there had been an entire non-user of a highway for a period of thirty years, and half of the same in width had been inclosed, fenced and in open, notorious and adverse possession for more than ten years, it was held that the public would be estopped to claim any right in the part thus inclosed. The other half having been but recently inclosed, the right of the public thereto had not been impaired.

Appeal from Lee District Court.

WEDNESDAY, APRIL 17.

PLAINTIFF is the owner of certain land situated on the line of what he claims to be a public highway, which was established in 1846 by the board of commissioners of Lee county. The defendant is a road supervisor. Certain owners of land adjoining the alleged road fenced their lands to the section lines thus inclosing the road, and plaintiff, after notifying the

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defendant to remove the obstructions from the road, commenced this action to compel him to do so.

The defendant answered, admitting the order establishing the road in 1846, but alleging that the same never became a legal highway, because it was not opened and worked, and had never been traveled by the public; that said road was inclosed and put in cultivation by the adjoining owners of the land more than ten years prior to the commencement of the suit; that said road had been for eighteen years abandoned by the public, and that in 1857 the proper authorities laid out and established, worked and opened a highway in the immediate vicinity which superseded the line of the road in question, and that the owners of the land along the line thereof have taken peaceable possession, improved, fenced and cultivated their lands traversed by the alleged road, and held the same adverse to the public and all others.

There was trial by the court, and an order made requiring the defendant to open thirty feet in width of said road for a distance of about one mile. Both parties appeal.

Van Valkenburg & Hamilton, for plaintiff.

Casey & Hobbs, for defendant.

ROTHROCK, J.—I. The original road as established in 1846 was some four miles in length. In 1857 another road was established, which runs some eighty rods on the same line, and the part of the original road now in controversy extends, from the line common to both roads, east, a distance of about one mile.

It seems to be conceded that the original road as established in 1846 was sixty feet wide.

The evidence fairly shows that the part of the road now in controversy has never been traveled by the public, but that the travel has been at points somewhat distant from the surveyed line. It has never been worked or put in condition for use, but the travel has passed over the open prairie at will, without regard to the surveyed line. The road as established is on a section line, and more than ten years before the com-

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mencement of the suit the owners of the land adjoining on the north fenced and cultivated to the section line, thus inclosing thirty feet in width of the road.

No obstructions, by fence or otherwise, were placed on the south thirty feet until some short time of, and within ten years prior to, the commencement of the suit. There were other parts of the line not now in controversy which were inclosed many years ago.

One of the adjoining owners of land erected a house which is partly situated on this part of the line.

The plaintiff claims that the defendant should be ordered to open the road to the full width of sixty feet instead of only thirty, and the defendant insists that, because of the statute of limitations, and the alleged abandonment of the road by the public, there is now no legal highway, and that no part thereof should be opened.

It is argued by the defendant that as the road never was actually opened the public lost all right in the alleged highway. ^{1. HIGHWAY: way in ten years from the date of the order establishing the same.} In the absence of any adverse possession by the adjoining owners we do not believe this proposition to be sound. As applied to an open prairie country, sparsely settled, and where the public travel at will, and roads are seldom worked so as to show the established line, we think the proposition that the public should be concluded, and the road deemed abandoned, for failure to use it in ten years is not correct. To so hold would in effect vacate many of the unused roads, streets, and alleys, in the State.

We are not now discussing the rights of the public in a highway acquired by prescription or dedication. This highway was established by the proper legal authority. Mere non-user of an easement of this character, and acquired in this manner, will not operate to defeat the right. Especially is this so when there is no use of the premises adverse to the right in the public. *Barlow v. The Chicago, Rock Island & Pacific R. R.*, 29 Iowa, 276; *Noll v. The Dubuque B. & M. R. R. Co.*, 32 Id., 66.

II. It is also claimed by the defendant that the establish-

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ment of a road in 1857 was a substantial abandonment of the road in question. We do not so regard it. The two roads along the line in question are situated half a mile distant from each other. They are not on substantially the same line so as to indicate an intention to supersede or abandon the old road, by establishing the new one.

III. It is next insisted that as for more than ten years before the commencement of this suit the owners of the adjoining 2. — : ad- lands have been in the actual, open, notorious, verse possess- and adverse possession of one-half in width of the sion : estop- pel. road in question, without objection by the public; that this is an extinguishment of the right of the public to that part of the road which has not been reduced to possession, and that by the failure of the public to assert the right the road has been abandoned. On the other hand it is claimed by the plaintiff that the statute of limitations does not run against the public; that this suit is in the nature of an action by the State, against which the statute cannot run, and that the adverse possession for more than ten years does not extinguish the right.

There is a want of harmony in the adjudicated cases upon this subject. Quite a number of cases declare that the public may lose their right to streets, roads, and other public places by long continued adverse occupation. See Washburn on Easements and Servitudes, 669-70, and authorities there cited.

On the other hand, the Supreme Court of Pennsylvania and of other states have held that no adverse possession and use of a public highway by individuals, however long continued, will give a title as against the state or the general public, as the statute of limitations does not run against them. *Com. v. Albner*, 1 Whart., Pa., 469-488; *Philadelphia v. Railroad Company*, 58 Pa. St., 253; *Simmons v. Cornell*, 1 Rhode Island, 519; *Jersey City v. Morris Canal Company*, 1 Beasley, N. J., 547.

In the case of *The City of Pella v. Scholte*, 24 Iowa, 283, it was held that ten years adverse possession of the whole of a public square, with the knowledge of the city, would bar an

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action brought by the city for the recovery of the square. In that case the principle is recognized that the statutes of limitations do not apply to the state or sovereignty; but it is held under the special facts there presented that the statute should operate as a bar as against the city. The court say that the rule there announced "would not necessarily apply to a case where the dedication was general, unlimited, and for the whole public, and not restricted, or for the primary benefit of the contemplated municipality, and hence under its special control and guardianship, or to a case where the public corporation was ignorant of its rights, or those of the public, or that these had been encroached upon, or that a hostile right was being asserted against it; or to a case where the action was by the state or its public officer to assert the public rights, and not the municipal corporation to assert *its* rights."

It will be readily seen that a distinction is here made between the rights of a municipal corporation and those of the state or the general public.

We believe the weight of authority is that the statute does not run against the general public because of the adverse possession of a highway established in the manner prescribed by law. Whether this rule should prevail in this State we do not determine; and yet we believe there are cases where the non-user has continued for such a length of time, and private rights of such a character have been acquired by long continued adverse possession, and the consequent transfer of lands by purchase and sale, that justice demands the public should be estopped from asserting the right to open the highway.

The first requisite to establish such estoppel should be that the adverse possession should continue for ten years, by analogy to the statute of limitations. Then it should be shown that there was a total abandonment of the road for at least the period of ten years.

In the case at bar there was an entire non-user of that portion of the road in controversy from the year 1846 to the present, being a period of nearly thirty years. It was originally four miles in length; a greater part of the line has been fenced

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and in cultivation for many years, in fact for nearly the active life of one generation. One of the adjoining owners built his dwelling house so that part of it is within the sixty feet claimed as part of the highway. The north half of the mile in controversy was inclosed and cultivated for more than ten years before this suit was commenced. Under these circumstances we believe the public should be estopped from claiming any right in the part of the line thus inclosed and in cultivation.

On the other hand, as the south half of the line has been but recently inclosed, no claim of the analogy furnished by the statute of limitations can be made. The adverse right to the land occupied by the road acquired by inclosing the north half extended only to that portion. Nothing can be claimed by way of constructive possession. It must be actual, open, visible and notorious, and limited to the inclosure, where adverse possession is claimed because of inclosure. Applying these principles to the case, our conclusion is that it should be affirmed upon both appeals. Each party should pay one-half the costs in this court.

AFFIRMED.

45	579
105	591

M E Y E R v. W E I G M A N.

1. **Evidence: ADVERSE POSSESSION: BOUNDARY LINE.** In an action to settle a boundary line between parties owning adjoining sections, where they stipulated that each was the owner in fee of the section he claimed, and where in the petition plaintiff claimed to own a division fence extending beyond the limits of his section, evidence tending to prove his adverse possession of the disputed area by the plaintiff for more than twenty years was admissible. ADAMS, J., *dissenting*.

Appeal from Clayton District Court.

TUESDAY, APRIL 17.

This is a suit in equity to ascertain and settle the boundary line between lands owned by the plaintiff and other lands

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owned by the defendant. It is alleged in the petition that plaintiff is the owner in fee simple of certain subdivisions of lands, which are particularly described; that said lands have been held in the open, actual, continued, and uninterrupted possession of the plaintiff, and those under whom he claims, for more than twenty years next preceding the commencement of this suit, and during said time a fixed and permanent division fence has been kept up and continued unchanged along the south line, as and for the south line of section twenty-five; that defendant owns, or claims to own, the northwest quarter of section thirty-six, adjoining the land of the plaintiff on the south, and that in November, 1870, the defendant took forcible possession of a part of plaintiff's land, and now holds possession thereof, claiming it as a part of section thirty-six. The prayer is that the boundary line between plaintiff's and defendant's lands be established, under the direction of the court.

The answer denies the allegations of the petition not admitted, and alleges that defendant is the owner of the northwest quarter of section thirty-six, and that the true boundary line is that known as the Peck line, being the line along which the fence of the defendant was built. It is further alleged in the answer that the old fence along said northern boundary (being the fence claimed by plaintiff as the boundary) was crooked, and was not regarded by plaintiff and those under whom he claims, or by defendant, as the true boundary line of said tract, and that the true line was sought and found by mutual agreement of plaintiff and defendant, and that without objection defendant built his fence upon said line, where it now stands.

The case was referred by consent of the parties. The referee reported that the plaintiff and those under whom he claimed had held adverse possession for more than twenty years up to the line known as the Keeler and Whitman fence line, and that, wherever the original section line may have been, plaintiff was entitled to hold to the said fence because of his adverse possession. There was a decree in accordance with the report of the referee and defendant appeals.

Meyer v. Weigman.

Hatch & Frese, W. E. Odell and Woodward & Preston,
for appellant.

James O. Crosby, for appellee.

ROTHROCK, J.—I. Pending the hearing before the referee, and after the introduction of some evidence upon the part of 1. ~~EVIDENCE~~: plaintiff, the certified abstract of the entry of adverse possession: session: boundary line. upon the parties agreed that the plaintiff owned in fee simple the east half of the southwest quarter, and thirty feet wide along the south side of the west half of said quarter to the Dubuque road, of section 25, 94, 4, and that the defendant owned in fee simple the northwest quarter of section 36, 94, 4.

It is urged by appellant that under the pleadings and this agreement no evidence as to an adverse possession was admissible, and that the only issue between the parties was as to the true line between the sections as established by the government survey. It seems to us that under the allegations of the petition, fairly construed, the plaintiff claimed to hold to the fence alleged by him to be the boundary line. Under no other construction can any force be given to the claim of adverse possession. He avers that this fence was kept up and maintained as and for the south line of section twenty-five. He does not allege that it was in fact upon the line established by the government survey. The allegation that he was the owner of certain sub-divisions of land was denied by the answer, and when it became necessary to prove his record title and he introduced the first item of evidence, the agreement as to title in both parties was made, not, as we assume, for the purpose of adjusting any right claimed, but only to obviate the necessity of formal proof of what neither party really disputed. We think, upon the whole record being considered, the agreement should have no greater effect than this. The parties before and after the agreement introduced evidence as to the location, continuance, and permanency of the partition fence claimed by plaintiff as his boundary, and evidence as to the possession of the plaintiff up to the fence.

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On the trial the plaintiff sought to prove that the fence was upon the true line between the sections, and in addition thereto that he was entitled to hold to the fence because of adverse possession, wherever the original line may have been.

II. We think the evidence as to the possession by the plaintiff up to the fence claimed by him as the boundary between the parties, and the adverse character of such possession, fully sustains the report of the referee and the decree of the court below. The case as made comes squarely within the rule announced in *Brown v. Bridges*, 31 Iowa, 138.

AFFIRMED.

ADAMS, J., dissenting.—In this case the defendant holds the patent title to the NW. $\frac{1}{4}$ of section 36, 94, 4, and the plaintiff holds the patent title to the land in section 25, immediately adjoining said section 36 on the north. The question submitted to the court was as to the location of the line between them.

A fence had been built, called the Keeler and Whitman fence. The plaintiff claimed that that constituted the line between the parties. The defendant claimed that the fence was on his land and that the line between them is several feet farther north. The case was referred to a referee, who, after taking a large amount of testimony in regard to surveys, occupancy, etc., reported in favor of the plaintiff; but he found (or says he would find if compelled to rule on the question) that the north line of section 36, as surveyed by government, was north of the Keeler and Whitman fence, and was in accordance with the survey known as the Peck survey. The court below confirmed the report, and rendered a decree establishing the line of the Keeler and Whitman fence as the section line between sections 25 and 36. In thus decreeing the court acted upon the theory expressed in the brief of the plaintiff's counsel, which is that section lines can be changed by adverse possession. He says: "It (the line of occupation) becomes the section line by such user, and that is the claim made in the petition. If it were not originally by the survey

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section 25 as far south as the line of occupation, such occupation makes it section 25."

This statement cannot be admitted as correct except in a very narrow sense. Where there is no better evidence as to where the section line, as surveyed by the government, is, the maintenance of a division fence as a section line fence by the owners of the respective sections might be regarded as some evidence of the location of the line as surveyed. The value of such evidence would depend, among other things, upon the length of time the fence had been maintained as a section line fence, and the greater or less correspondence with other lines recognized as section lines. A section line established upon such evidence might, in fact, differ somewhat from the line as originally surveyed. But that is not the theory. The theory is, not that a new section line has been established, but that the old one has been found.

If a person claims that the division line between him and his neighbor has been shifted, by reason of his having held adversely, for the statutory period, a portion of his neighbor's land, he has no occasion to demand that a section line should be regarded as shifted and bent so as to comprehend the land in question under some denomination that would seem to make his possession not adverse.

To the decree of the court below there is a valid objection. To allow new section lines and corners to be established by decree of court, confessedly different from the government section lines and corners, would in the course of time work great mischief by introducing ambiguity and confusion into deeds and other instruments affecting real estate. It is of the utmost importance that the words *section line* and *section corner* should have but one meaning, and should be regarded, in theory at least, as stationary and not migratory.

We need no better case than the present to illustrate the trouble that will be caused. By the decree a new section corner has been established; yet there is nothing in the decree to indicate that it is a new one. There is not a word in the decree about adverse possession, or the basis of the action of the court. Any one in examining the decree would naturally

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infer that the line of the Keeler & Whitman fence was found to be the government line. The consequence is that a disturbing element has been introduced into the lines of that neighborhood, and no one can foresee the trouble that may result.

Upon the subject of decreeing a new section line after the government line was found the majority opinion is silent. It is to be inferred that it is regarded as a matter of indifference whether the line of the Keeler and Whitman fence is decreed to be the section line between sections 25 and 36, or simply the division line between the parties. It appears to be thought that if the decree is not right in terms, it is in effect, and so ought to be affirmed. This leads us to consider whether it can be under the petition, and especially under the petition and stipulation to which reference has been made. I think it cannot. It gives the plaintiff more land than he avers that he is entitled to. The plaintiff's averment is "that he is the owner of the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$ of section 25, 94, 4, and also a tract commencing at the SE. corner of the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of said section, thence west to the Dubuque road, thence north 30 feet, thence east to a point 30 feet north of the starting point, thence south 30 feet, which said premises have been held in the open, actual, continued and uninterrupted possession of the plaintiff and those under whom he holds for more than twenty years next preceding the commencement of this suit, and during said time a fixed and permanent division fence has been kept up and continued unchanged along the south line as and for the south line of said section 25."

The majority of the court claim to find in the foregoing an averment in substance that the plaintiff has occupied adversely south of the south line of section twenty-five, to-wit: a part of section thirty-six. To my mind the language used will bear no such construction. On this point the language of the majority opinion is: "It seems to us that under the allegations of the petition, the plaintiff claimed to hold to the fence alleged by him to be the boundary line."

The land which the plaintiff says he held adversely he speaks of as "which said premises," referring to premises which he had described in the same sentence as being wholly in section

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twenty-five. It is not for us to make the petition speak a different language from what it bears, but such seems to me to be the effect of the majority opinion.

To determine whether that is the effect, we will suppose that the defendant had admitted the allegations as above quoted from the petition, and will suppose also that the location of the government line was undisputed. What decree then should have been rendered as to the establishment of the boundary line? No other line could have been established than the government line. If the petition is admitted the decree will follow it of course, and no other line could possibly be described from the petition than the government line. This will not be denied. It follows, then, that in the opinion of a majority of the court the plaintiff is entitled to a more favorable decree, on the point of adverse possession, than if his petition on that point had been admitted.

This results from construing the petition not by its own terms, but with reference to the evidence. It is said in the majority opinion: "Under no other construction can any force be given to the claim of adverse possession." Plaintiff avers that he has held adversely certain land in section 25, amounting to a little more than a quarter section. Now the majority of the court say, virtually, that as it appears that he held the undisputed patent title to said land, the petition must be construed as meaning not that he held the adverse possession of that land as he says he did, but of a part of section 36 which he says nothing about.

A stipulation has been referred to as relied upon by the appellant. The part with which we are concerned is in these words: "The defendant, Henry Weigman, owns in fee simple the northwest $\frac{1}{4}$ of section 36, 94, 4." The appellant claims, and I think very properly, that that is an agreement that the defendant is the owner of the whole quarter section, and that the only question to be litigated was as to the location of the line between it and section 25. I do not think that we are permitted to go outside of the stipulation to construe it. But, if I should do so, I should come to a different conclusion from that of the majority of the court. In construing it they refer

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to the fact that, after it was made, evidence was introduced in relation to adverse possession. It is true such evidence was offered by the plaintiff and admitted by the referee, but it was against the objection of the defendant.

Besides, the plaintiff's theory was that adverse possession would change the location of section lines; that if the land in controversy was not originally in section 25 it is now; and that, he says, is the claim made in the petition. The decree also is based on the same theory. That accounts, I think, sufficiently for the plaintiff's willingness to be governed by section lines, and for the manner in which the trial was conducted on his part. I see no reason why the stipulation should be construed as containing an exception of so much of section 36 as lies north of the Keeler and Whitman fence.

HIGLEY & CO. V. MILLARD ET AL.

1. **Homestead: Incumbrance upon: Antecedent debt.** Under the Code of 1851 and Revision of 1860 the homestead could be sold only to supply a deficiency existing after exhausting the other property of the debtor liable to execution, whether the debt existed before the purchase of the homestead, or was contracted afterward and secured by mortgage on the homestead.
2. ——: ——: **Notice.** A mortgage upon the homestead was of no validity unless both husband and wife united in the execution, and the record of it, therefore, imparted no notice to a subsequent purchaser.
3. **Vendor and Vendee: Title bond.** The purchaser from one who has a title bond to the property but who at the time of the sale is occupying it as a homestead, and has become entitled to a conveyance thereof, has the superior equity to one who merely holds a note against the obligee in the title bond, even though the note ante-date the execution of the bond.

Appeal from Black Hawk District Court.

TUESDAY, APRIL 17.

ON the 17th day of August, 1855, J. R. Millard executed to Isaac N. Whittam a promissory note for the sum of

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\$344.50. On the 17th of January, 1856, said Millard purchased of B. M. Cooley lots 8 and 9 in block 59, in the town of Waterloo, and procured from him a bond for the conveyance of the property upon payment of the purchase price therein stipulated. This bond was recorded but was not acknowledged. J. R. Millard and Phebe, his wife, moved upon the premises and occupied them as their homestead. On the 2d day of November, 1857, whilst the premises were so occupied as a homestead, J. R. Millard, his wife not concurring therein, executed to Isaac N. Whittam a mortgage to secure the note above mentioned. Afterward said note and mortgage were assigned to plaintiffs.

On the 3d day of September, 1860, J. H. Leavitt and J. L. Cooley, administrators of the estate of B. M. Cooley, deceased, for the expressed consideration of one dollar executed to Phebe **Millard a quit claim deed for said premises.**

On the 27th day of March, 1862, Millard and his wife executed a warranty deed for said premises to Harvey C. Marsh.

On the 2d day of September, 1864, Marsh and wife conveyed said premises by warranty deed to the defendant, Josiah Dull.

On the 2d day of December, 1867, the plaintiffs commenced an action upon the note above named and for the foreclosure of the mortgage securing the same, making defendants therein all of the above named defendants in this action. All of the defendants, except J. R. Millard, filed in that action their joint answer, denying all the allegations of the petition, alleging that the mortgaged premises, at the date of the mortgage, belonged to Phebe Millard, that they were occupied by J. R. and Phebe Millard as their homestead, and that the mortgage was made without the consent or knowledge of Phebe Millard and was void. On the 21st day of September, 1869, judgment by default was entered against J. R. Millard for \$829.60, with a decree of foreclosure. On the same day the plaintiffs, without prejudice, dismissed all proceedings as to all the other defendants, to which the defendants Phebe Millard and Josiah Dull excepted. On the 24th day of September, 1869, three days after said dismissal, this action was commenced, for the purpose of subjecting said premises to sale in satisfaction of

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the judgment and decree of foreclosure against the defendant J. R. Millard. The court entered a decree for plaintiffs as prayed.

The defendants, Phebe Millard and Josiah Dull, appeal.

Boies, Allen & Couch, for appellants.

Miller & Preston, for appellees.

DAY, CH. J.—I. It is claimed by appellants that the mortgage upon the homestead, not having been concurred in by ^{1. HOMESTEAD: incumbrance upon: anteced-} the wife, is void; whilst the appellees insist that the mortgage, having been executed for a debt contracted before the homestead was purchased, and for which the homestead is liable, is valid, and may be enforced, although not signed by the wife. The mortgage was executed in 1857, and its effect, if valid, is to be determined by section 1249 of the Code of 1851, 2281 of the Revision. This section is as follows: “It (the homestead) may be sold on execution for debts contracted prior to the passage of this law, or prior to the purchase of such homestead (except where otherwise declared) or for those created by written contract executed by the persons having the power to convey, and expressly stipulating that the homestead is liable therefor. But it shall not in such cases be sold, except to supply the deficiency remaining after exhausting the other property of the debtor which is liable to execution.”

It will be seen from this section that, under the law in force when this mortgage was executed, the homestead could be sold only to supply a deficiency existing after exhausting the other property of the debtor liable to execution, whether the debt existed before the purchase of the homestead, or was contracted afterward and secured by mortgage upon the homestead; so that the execution of a mortgage by the husband, upon the homestead, to secure a debt which existed before the purchase of the homestead, imposed no additional burden thereon, and in no way affected the rights of the wife. As to Phebe Millard it is immaterial whether the mortgage be considered as

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valid or not, since in either event, under the section above quoted, the liability of the homestead is the same. But, as to innocent purchasers of the homestead, before judgment upon the debt so contracted, the question of the validity of such mortgage is very material, for, if void, the record of it would be to them no constructive notice, and, as against them, it would create no lien.

II. In March, 1862, Millard and wife executed a warranty deed of said premises to Harvey C. Marsh, and in September,
2. —: —: 1864, Marsh executed a like conveyance to the
notice. defendant, Josiah Dull. These conveyances were made long before suit was commenced upon the note and mortgage in controversy. At the time of these conveyances there was nothing of record, anywhere, to impart notice that the property in question was liable for the debt to Whittam, unless it be the mortgage in question.

Section 1247 of the Code of 1851, 2279 of the Revision, provides that a conveyance of the homestead is of no validity, unless the husband and wife concur in and sign such conveyance. This mortgage, therefore, is invalid, and the record of it imparted no constructive notice to subsequent purchasers. If either Marsh or Dull is in all other respects entitled to the protection of an innocent purchaser, it must follow that the title of the defendant, Dull, cannot be burdened with the plaintiffs' judgment.

III. This brings us to consider the interest acquired by Marsh through his purchase from Millard and wife, in March, 1862.

The conveying part in the quit claim deed from the administrators of B. M. Cooley, is as follows: "In consideration
3. vendor of one dollar, in hand paid by Phebe Millard, do
and vendee: hereby forever quit claim to the said Phebe Millard, her heirs and assigns forever." It does not appear that this deed was made pursuant to the order or direction of any court. See Revision, section 2460. It is claimed that this conveyance is ineffectual to pass the legal title, and that the title is still in the estate of B. M. Cooley, deceased. Let all

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this be conceded. How, then, stands the case? In July, 1856, B. M. Cooley executed his bond to J. R. Millard, conditioned for a conveyance of the property upon the payment of the purchase price. The evidence shows that in September, 1860, the purchase price had been fully paid. At that date, then, J. R. Millard was entitled to a conveyance from the estate of Cooley. He had the equitable title to the property in controversy. This equitable interest, at least, passed to Marsh, by the warranty deed from Millard and wife in March, 1862. It does not appear that he had any actual knowledge of the note to Whittain, and, as we have seen, the mortgage imparted no constructive notice.

The defendant Dull purchased in September, 1864, also without actual or constructive notice, and paid, as appears, a consideration of \$600. Under such circumstances his equity is superior to that of the plaintiffs, who acquired no lien upon the premises until they recovered their judgment in September, 1869.

It becomes unnecessary to consider the question of the statute of limitations, upon which defendants rely, or whether Phebe Millard, as defendants claim, purchased the property with her own means.

REVERSED.

Gray v. Mount.

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| 45 | 591 |
| 88 | 45 |

1. **Constitutional Law: STATUTES NOT EMBRACED IN CODE: SWAMP LAND FUND.** Statutes which are public and special, whose subjects are not revised in the Code, are not repealed unless their provisions are repugnant to the enactments of the Code, and in this class are included the statutes upon the subjects of Swamp Lands and the Swamp Land Fund.
2. **Swamp Lands: APPROPRIATION OF FUND: SPECIAL ELECTION.** It is competent for the board of supervisors to submit the question of the appropriation of the Swamp Land Fund to the electors at a special election.
3. **— : — : BOARD OF SUPERVISORS.** The board of supervisors alone have authority to submit the proposition for appropriating the Swamp Land Fund to the erection of a county high school building at a certain place.
4. **Election: PROPOSITION FOR OUTLAY OF MONEY.** In the submission to the electors of a proposition for the outlay of money, two distinct objects, each calling for a certain specified amount of funds, cannot be included in one proposition, so that the voter shall be unable to vote for the one and against the other.

Appeal from Guthrie Circuit Court.

WEDNESDAY, APRIL 17.

IN CHANCERY. The petition alleges, as grounds of relief:

1. The county of Guthrie holds \$21,388.94, proceeds of swamp lands heretofore sold by the county and known as the Swamp Land Fund.
2. That on the 4th day of January, 1876, the board of supervisors of the county, constituted of defendants as members, upon a petition of certain legal voters, ordered a special election to be held in the several voting precincts of the county, to be held on the 14th of February, 1876, at which the following proposition was submitted to the electors: "Shall the Swamp Land Fund of Guthrie county, Iowa, be devoted by the board of supervisors of said county to the erection of a court-house at Guthrie Centre, in said county, and a county high school in the town of Panora, in said county, in the pro-

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portion of two-thirds thereof to the erection of said court-house and one-third to the erection of said county high school building?"

3. At a special election held pursuant to the order of the board of supervisors the proposition submitted to the electors received the affirmative vote of a majority of the votes cast.

4. It is charged in the petition that the proceedings are contrary to law, and the proposition to devote the Swamp Land Fund to the two separate purposes indicated in the submission was submitted in that form in order to unite the friends of each project, when neither object alone would have been adopted by the electors. It is therefore claimed that petitioners and other voters have had no opportunity fairly to exercise their right of voting for one of the objects and against the other.

5. At the general October election for 1875 a proposition was submitted to the electors of the county to authorize the erection, at Guthrie Center, of a court-house at the cost of \$25,000, and was rejected.

6. At the general election of 1874 a proposition was adopted by the electors establishing a high school at Panora and appropriating thereto the old court-house building.

7. The petition prays that the defendants be restrained from appropriating the Swamp Land Fund in the manner provided by the vote of the electors upon this joint proposition.

Upon this petition the Judge of the Circuit Court allowed an injunction restraining the appropriation of the Swamp Land Fund to the purpose of erecting a court-house, the probable cost of which shall exceed \$5,000, until a proposition therefor shall have been submitted to the legal voters of the county and adopted. No injunction further restraining the action of defendants was allowed.

The defendants answered the petition, substantially admitting the facts alleged in the petition as above set out.

At the following term of court the injunction allowed by the Judge was dissolved, and thereupon plaintiffs appeal.

Gray v. Mount.

Wright, Gatch & Wright and C. Haden, for appellants.

C. C. Cole, for appellees.

BECK, J.—I. It is first insisted by plaintiffs that the submission of the proposition to the voters and their adoption thereof are illegal and void, because the election 1. CONSTITUTIONAL law: at which the popular will was expressed was statutes not embraced in special. Relying upon Code, § 303, par. 24, they code: swamp land fund. contend that questions of this kind can be submitted to the people only at a general election. This provision prescribes that the supervisors shall not order the construction of any public building exceeding in cost \$5,000, until a proposition therefor shall have been submitted to and adopted by the voters at a general election.

Under enactments relating to the swamp lands of the State and the appropriation of their proceeds by the counties, it is provided that, upon an affirmative vote of the people, at any *general or special* election, upon a proposition submitted to them, the lands or proceeds arising therefrom may be devoted to the erection of county buildings and buildings devoted to the purposes of education. Revision of 1860, Chap. 47, title 7, §§ 925, 957, 986, and §§ 250, 251, Chap. 77, Acts Ninth Gen'l Assembly, and Chap. 135, Acts Thirteenth Gen'l Assembly. Counsel for plaintiffs maintain that these provisions are superseded and repealed by the Code. This position presents the only disputable question involved in this point of the case. If these statutes are in force the vote of the people upon the subject of the appropriation of the Swamp Land Fund may be had at a special election; if they are repealed, such vote must be at a general election.

We must inquire, then, whether these statutes are in force. They are not revised or incorporated in the Code. They are public in their nature and special in their provisions, for they apply to a special subject and none other. Their provisions, so far as the appropriation of the Swamp Land Fund is concerned, are applicable to no other fund or public moneys. They are special statutes applicable to the acquisition, dispo-

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sition and sale of swamp lands, and the appropriation of their proceeds by the counties; they are public, because their subjects are public property and public funds. They are, then, public and special statutes.

Code, § 47, provides that "all public and general statutes, passed prior to the present session of the General Assembly, and all *public and special acts*, the subjects whereof are revised in this Code, or which are repugnant to the provisions thereof, are hereby repealed"

The statutes in question, being public and special, and the subjects thereof not being revised in the Code, as we have seen, are not repealed, unless their provisions are repugnant to enactments in the Code. But no such repugnancy exists, for there is not one word upon the subject of the appropriation of Swamp Land Funds found in the Code.

The report of the commissioners for the revision of the statutes, whose work resulted in the preparation of the Code, <sup>2. SWAMP
lands : appro-
priation of
funds : special
election.</sup> expressly states that the statutes upon the subject of swamp lands and the Swamp Land Fund (Rev., Title 7, Chap. 47), were considered by them as local and obsolete, and were, therefore, not revised and incorporated in the Code. We reach the conclusion, therefore, that it was competent for the supervisors to submit the question of the appropriation of the Swamp Land Fund to the voters at a special election.

II. Plaintiffs insist that it was not competent for the supervisors to submit the question of the location of the ^{a. — : — : board of su-} county high school, or the question of the appropriation of the Swamp Land Fund to building a school-house to the voters of the county. They maintain that such power is conferred exclusively upon the trustees of the high school. But it is not claimed that these trustees are clothed with the power of submitting questions of taxation or of appropriation of funds to the voters. While they may select the site of the school-house and demand and accept, or refuse, funds appropriated by the vote of the people to the purposes of the high school, this by no means requires us to hold that the submission of all questions upon which the

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people are authorized to vote, touching these matters, cannot be made to the electors by the supervisors. Indeed, there is no other way pointed out by which the will of the voters may be ascertained. It is not shown that the trustees of the high school have chosen another location for the institution than the one named in the proposition submitted to the people, or that they will not accept the appropriation and devote it to the uses indicated by the vote. We conclude that the objection under consideration is without force.

III. The next matter urged against the validity of the proceedings is the union of two objects, and two separate appropriations for distinct objects, in one proposition, so that the elector could not vote for one and money against the other. We think this presents a fatal objection to the legality of the proceedings.

The question to be submitted to the voters was not simply whether it was their will to appropriate the fund; but there must be an *object* for the appropriation in order to constitute the proposition to be voted upon. The object is of the essence of the proposition. This cannot be denied. The appropriation for a given object is the proposition submitted. If there be two objects and a specified amount of funds to be devoted to each, it is very plain that there are two propositions submitted at the same election. If they are submitted together, it is very clear that the voter cannot vote for one and against the other. He must vote against both, whereby he may defeat one, the success of which he desires, or he must vote for both, whereby he may cause the success of one which he desires to be defeated. If he fails to vote he may thus aid in causing the defeat of his favorite measure, and the adoption of the one he opposes. He has thus no liberty of choice. The plan of submitting the questions, for there are two, resembles more the common device of an auctioneer in disposing of worthless goods, whereby a good article is mingled with them and made to draw bids, or the cunning tricks of gamesters to induce wagers of the unwary, rather than the open, direct and fair manner that always should prevail in elections by the people. The very letter as well as the spirit of our election laws con-

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demns this plan. It has never been heard of that electors were, by any plan, denied the right of choosing one, and rejecting another candidate for office, to be voted for at the same election.

This very point, the necessity of submitting to the electors distinct propositions for the outlay of money, so that they may exercise the liberty of choice in voting for one and against another, was presented in *McMillan v. Boyles et al.*, 3 Iowa, 311, and decided in accord with the views we have just expressed. That case and this are not different as to the controlling facts in each. In that case several propositions were submitted to the voters of a county at the same election, each for subscribing to the stock of a railroad company, other than those separately named in the other propositions, and the payment of the stock by bonds issued by the county. There were thus three separate and distinct propositions. But it was a condition of the submission that no subscription should be made to either railroad unless there should be a majority of votes for each proposition. The result was that a vote against one was really counted as a vote against all. The voter could not exercise freedom of choice in voting for one and against another. The proceedings and the adoption of all the propositions in this manner were held invalid. We are able to make no distinction in the controlling fact of that case and of this. It is in both the same, namely: the voter is deprived of the liberty of voting against one proposition without giving a negative ballot to all. Indeed, the case before us is, if possible, more objectionable in its facts than *McMillan v. Boyles et al.* In that case the elector could vote upon the separate propositions; in this he could not.

The decision in the case just cited is supported by the most satisfactory reasons, presented in a clearly expressed opinion. It is not proper to repeat the argument of the learned Justice announcing the decision of the court. It is sufficient to say that we adhere to the conclusion reached therein.

The learned and ingenious counsel for defendants points

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out, perhaps successfully, that a part of the *argument* found in the opinion in *McMillan v. Boyles*, is not applicable to this case. This may be admitted, for our present purpose, without inquiry into the correctness of the positions. But it is quite clear that the argument taken in hand by counsel was not wholly relied upon by the court. Indeed, it is used in the opinion, as it is there stated, simply to *strengthen* the views advanced therein. We would not feel our confidence in the conclusions we adopt at all shaken were we fully to admit the positions of counsel in reference to that argument. Indeed, we may say that we are prepared to rest our conclusions upon the reasons we have announced, together with those found in *McMillan v. Boyles* which counsel has not assailed.

It is our conclusion that, for the defects above pointed out, the proceedings against which plaintiffs seek relief are invalid. The relief, therefore, should have been granted.

REVERSED.

SWITZ V. BLACK ET AL.

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137 55

1. **Practice: JOINDER OF PARTIES: MORTGAGE.** In an action to quiet title to distinct parcels of land, mortgagees of the land may properly ask to be made parties, and by cross-petition may seek a decree of foreclosure, and the grantees of a purchaser at a subsequent tax sale alleged to be fraudulent may also be joined and the validity of the tax sale determined therein.
2. **Vendor and Vendee: INNOCENT PURCHASER.** A party cannot claim protection as an innocent purchaser when the records disclose that his grantor has no power to convey, or that one assuming to convey as attorney in fact has no power so to do.

Appeal from Iowa Circuit Court.

WEDNESDAY, APRIL 18.

JOHN L. SWITZ purchased at tax sale the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, 38, 79, 9, and ALFRED SULLY purchased at the same time the SW. $\frac{1}{4}$

Switz v. Black.

NE. $\frac{1}{4}$ of the same section, and one Beebe at the same time purchased another tract of land. All these purchases were made in October, 1869. Switz filed a petition to quiet his tax title, making James Black, the owner of the fee, and Wetherell, the holder of a mortgage executed by Black, parties defendant. Wetherell, at the time of the tax sale, held his mortgage from Black upon all three of these tracts of land, and one Ricord also held a mortgage from Black on the same lands. Each of these mortgages secured the payment of certain moneys by Black.

Wetherall answered the petition of Switz, and both he and Ricord, respectively, with leave of court, filed cross-petitions for the foreclosure of their mortgages, making Black, the mortgagor, Switz, the plaintiff, and Sully, Beebe, Clara H. Carhart and Patrick Byrne parties defendant, and asking decrees of foreclosure and the setting aside of the three several tax purchases and deeds to the various parcels of the mortgaged property. It was alleged in these petitions for foreclosure that the tax titles were fraudulent and void by reason of a corrupt and fraudulent agreement among the bidders at the tax sale, that each should bid by turn and that there should be no competition.

Service was made upon Black, Beebe and Carhart as defendants to the cross-petitions for foreclosure, and no appearance having been made for them, or either of them, a decree of foreclosure was rendered against them on the 28th day of April, 1875, and setting aside as illegal and fraudulent the tax purchase of Beebe and that of Sully, under which Carhart claimed, and vacating Carhart's interest.

Sully took a treasurer's deed, dated Nov. 12, 1872. On the 25th day of February, 1873, he conveyed the land by a general warranty deed to Clara H. Carhart. On the 11th day of November, 1873, Sully, by R. A. Sankey, his agent, by written agreement, sold the land to Patrick Byrne.

On the 8th day of July, 1874, Clara H. Carhart executed a power of attorney to Sully, authorizing him to make and deliver deeds of all lands owned by said Carhart in Iowa county, Iowa. On the 1st day of May, 1874, Clara H. Car-

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hart, by Sully, her attorney in fact, executed a deed to Patrick Byrne for the land in controversy. It does not appear from the record before us when this deed was delivered, if at all.

There was an issue made by Switz upon the allegations of the cross-petitions for foreclosure, and also an issue made by Sully and Patrick Byrne. The answer of Byrne set forth that he was an innocent purchaser, and could not be affected by the alleged fraudulent tax sale.

The court below rendered a decree foreclosing the mortgages and finding that the tax sale was fraudulent, and providing that the holders of the tax titles should be paid the full amount of taxes and interest which would have been due to the county and State in case the land had not been sold. The defendant Byrne alone appeals.

C. Hedges, R. A. Sankey and Dosh Brothers & Carestens,
for appellant.

Clark & Haddock, for appellees.

ROTHROCK, J.—I. The defendant Sully moved the court to strike out of both cross-petitions all those parts having relation to the title to the lands purchased by him at the said tax sale, because the petitions improperly joined different tracts and embraced matters not a part of the original cause of action, nor in any manner connected with the original suit.

1. PRACTICE: joinder of parties: mortgage.

This motion was overruled, and counsel for appellant now insist that the motion should have been sustained. We think the ruling of the court below was correct. There can be no question about its correctness as to the petition of Ricord. He was not a party to the original suit, and the other parties thereto, Black, Wetherell and Switz, made no objection as to misjoinder of parties. Ricord had the right at any time to commence an original suit in foreclosure, and it is entirely immaterial to the defendant Byrne in what manner the other parties are brought before the court. Wetherell was a party defendant to the original suit. His cross-petition was filed with leave of the court. His mortgage covered all three of

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the tracts of land, and we are unable to see how Sully could compel him to foreclose his mortgage by piece-meal, because he, or rather his grantee, claimed no interest in the land claimed by Switz. What possible prejudice it could be to Sully or to Byrne we are unable to determine.

Our attention is called by counsel to section 2663 of the Code. We fail to see any provision therein which would preclude a joinder of parties under the facts disclosed in this case.

II. It is insisted that Wetherell and Ricord, being mere mortgagees, have no right of action against Sully and Byrne.

^{2. VENDOR} ^{and vendee:} They certainly have a right as mortgagees to show the invalidity of the tax sales, and to subject the purchaser. land to the payment of their mortgages, and this is the effect of the decree of the court below, as we understand it. It is proper to observe that defendant Byrne is not offering to redeem from the mortgages.

III. The evidence satisfactorily shows that there was an unlawful combination of bidders at the tax sale, by which it was agreed that there should be no competition. The defendant Byrne, however, insists that he is an innocent purchaser of the land in question without notice of the fraudulent character of the sale.

It will be seen by the foregoing statement of facts that on the 11th day of November, 1873, when Sully, by Sankey, his agent, contracted to sell the land to Byrne, Sully was not the owner. He had conveyed to Carhart on the 25th day of February, 1873, and the deed of conveyance was filed for record March 4, 1873. Next we have a deed from Carhart by Sully, attorney in fact, dated May 1, 1874, which has not been filed for record, and which, if delivered at all, must have been after the filing of the cross-petition herein.

The trial in the court below was had in November, 1875, and Byrne then testified that he had lately received a deed, and there is enough in the evidence to satisfy us that he knew there would be, or was, litigation about the title before he received his deed. He says: "When I heard it was going into suit to contest the title, I made up my mind I would pay

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no more until this matter was disposed of, so a good title could be made to me."

The power of attorney from Carhart to Sully was made on the 8th day of July, 1874, filed for record September 1, 1874. It makes no reference to conveyances already made by Sully.

It will, therefore, be seen that when Byrne made his contract with Sully the record of titles showed that Carhart was the owner, and at the date of the deed from Carhart by Sully, as attorney, the records did not show that Sully had any such power. The power afterwards made only covers deeds to be made in the future.

Under all these circumstances Byrne can make no successful claim that he is an innocent purchaser without notice. If he had examined the records of titles he would have seen that the party he contracted with had no title to convey, and that the attorney in fact who attempted to convey had no power to convey.

AFFIRMED.

BROWN v. COLE ET AL.

45.	601
98	512

45	601
103	609

1. **Contract: CONSTRUCTION OF.** Where a contract provided for the delivery of one hundred thousand brick, to be counted and enumerated according to the custom of bricklayers, *held*, that the contractor was bound to furnish only the number specified according to such estimate, even though as a matter of fact the number was less than one hundred thousand.
2. **Jury: IMPEACHMENT OF VERDICT.** Affidavits of jurors respecting the motives which induced an agreement to a verdict will not be received for the purpose of impeaching the same.

Appeal from Story Circuit Court.

WEDNESDAY, APRIL 18.

PLAINTIFF and defendant, John Cole, entered into an agreement in writing whereby said Cole sold and agreed to deliver to the plaintiff "one hundred thousand brick, of good merchantable quality, sufficient to make a good substantial wall

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to a two story brick building, * * * * said brick to be counted and enumerated in the wall according to custom and rule of bricklayers in ascertaining the number of brick in a solid wall, not allowing anything for space occupied by openings in wall."

The petition alleged the defendants had failed to deliver forty thousand of said brick, and as the plaintiff had paid for one hundred thousand she sought to recover for the brick not delivered.

The defendants, by way of counter-claim, alleged that they had delivered more brick than the contract called for, which the plaintiff had received and accepted, and they sought to recover for the brick delivered in excess of the contract.

There was a trial by jury; verdict for defendants, and plaintiff appeals.

Rainbolt & Barnes, for appellant.

McCarthy, Stevens & Underwood, for appellees.

SEEVERS, J.—I. Counsel for appellant state the questions for determination to be as follows: "Aside from the question 1. ^{CONTRACT} _{construction}: of defective and irregular verdict of the jury, it seems that all other questions in this case are merged in these two, to-wit: Does the method pointed out by the contract for ascertaining the number of brick mean no more than, and nothing different from, the rule known as 'masons' measurement,' and, shall the openings in the wall, under the reading of the contract, be considered filled with brick in arriving at the number of brick delivered by defendants." The question, then, is how, under the terms of the contract, are the brick to be counted. We are unable to see any ambiguity in the contract, either latent or patent, and the contract itself provides the rule for "counting and enumerating" the brick. If the contract had provided for the delivery of one hundred thousand brick, and there stopped, we suppose the plaintiff would have been entitled to that number of brick by actual count, but the brick were to be "counted and enumerated in the wall according to the custom and rule

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of bricklayers in ascertaining the number of brick in a solid wall, not allowing anything for space occupied by openings in wall." This, then, is the way the parties have determined the brick shall be counted. It is true that the rule adopted by bricklayers is at best but an arbitrary estimate, and it is not pretended that the actual number of brick in the wall is thereby ascertained. This, however, is immaterial, because the parties have stipulated the count shall be made in accordance with that rule. It must be evident that an actual count of the brick was not intended, for the contract contemplates a counting "in a solid wall." Now, it is simply impossible to count and ascertain how many brick are in a solid wall more than one brick in thickness. The wall was to be solid, and no allowance made for openings. The Circuit Court having construed the contract in accord with the foregoing view, it follows no error was committed in so doing.

II. One of the jurors filed an affidavit that he was sick, and in consequence thereof had agreed to the verdict. And ^{2 JURY: im-} another juror stated in an affidavit that he "agreed ^{peachment of} verdict, to the verdict solely on account of the sickness of said juror and the apprehended injury to him by longer confinement, and out of regard for his personal health; that, had said juror been in good health, I would not at the time I did have consented to said verdict."

Counter affidavits were made and filed by other jurors tending strongly to show that the sickness of the juror was quite mythical; and we presume the court below overruled the motion for a new trial on the ground that jurors who would so stultify themselves as these men have done were unworthy of belief, and in this view we concur. Besides this, affidavits of this character cannot be received or considered for the purpose of impeaching a verdict. *Cowles v. C., R. I. & P. R. R. Co.*, 32 Iowa, 515, and authorities cited.

AFFIRMED.

Stewart v. Lay.

45 604
103 580
45 604
113 28

STEWART V. LAY.

1. **Receiver: IRREGULARITIES OF: JURISDICTION.** Any irregularities in the proceedings of a receiver can be corrected only by the court which appointed him, and his conduct will not be reviewed in an action in another forum.
2. **Corporation: LIABILITY OF STOCKHOLDER: JURISDICTION.** Where the assets of a corporation, with assessments upon the shares of stockholders, are sufficient to meet the corporate obligations, the stockholders are not liable in addition to an amount equal to their shares of stock, and the question of such sufficiency can be determined in an action at law.
3. _____: _____: **LIMITATION OF.** The liability of one stockholder is not limited by the amount which can be collected from other stockholders.
4. _____: _____: **ACTS OF RECEIVER.** The fraudulent acts or neglect of the receiver of an insolvent corporation constitute no defense to an action against a stockholder for contribution.
5. _____: _____: **EQUITIES BETWEEN STOCKHOLDERS.** The liability of the stockholder is separate from that of the other stockholders and may be enforced in an action at law, in which it is not essential to the establishment of his liability that the equities between him and his associates be determined.

Appeal from Dubuque District Court.

WEDNESDAY, APRIL 18.

ACTION at law against a stockholder of the Dubuque Savings Institution to recover the amount of unpaid assessments upon the stock, and a further amount equal to the stock for which the defendant is alleged to be liable on account of indebtedness accruing against the corporation while defendant was a stockholder therein. The petition of the plaintiff filed in the case is as follows:

"William G. Stewart, receiver of the Dubuque Savings Institution, plaintiff in this suit, by H. B. Fouke and W. J. Knight, his attorneys, brings this his suit against the defendant, James C. Lay, and claims of the said defendant the sum of ten thousand dollars, and for cause of claim states:

"I. That the Dubuque Savings Institution organized,

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under and by virtue of the laws of the State of Iowa, as a banking incorporation, on or about the 18th day of February, A. D. 1866.

"That said institution issued its shares at one hundred dollars the share, and that said defendant became a member of said incorporation and shareholder thereof to the amount of fifty shares, representing the sum of five thousand dollars; that at the time of becoming the owner of said shares defendant paid thereon an assessment of ten per cent, or five hundred dollars in the aggregate. That said incorporation was organized to do business in Dubuque, and was engaged in the banking business at Dubuque from the time of its organization until on or about the 4th day of October, A. D. 1873, when said Dubuque Savings Institution became insolvent and was so declared by the District Court of Dubuque county, Iowa.

"That upon proper application, made by the proper officers of the State, plaintiff was by said court appointed the receiver of said Dubuque Savings Institution, and was on said 4th day of October, A. D. 1873, duly qualified as such receiver, and entered upon his duties as such, as by the papers and proceedings in that behalf still remaining in the office of the clerk of said court will more fully appear. That afterwards, to-wit: on the 27th day of October, A. D. 1873, said plaintiff, as receiver, under the authority and direction of said court, made an assessment of ninety per cent upon the capital stock of said Savings Institution, ten per cent of said capital stock having been previously assessed and paid in, and said plaintiff, as such receiver, gave both public notice in the newspapers printed in the city of Dubuque, and also personal notice to all the shareholders of said Savings Institution, that unless said assessments so made by plaintiff were paid, on or before December 1st, A. D. 1873, the same would be collected by suit.

"That said defendant is a shareholder in said institution of fifty shares of said stock, representing the sum of five thousand dollars, is indebted upon his said assessment to the sum of forty-five hundred dollars, of which assessment and

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demand of payment he has had due notice, but has hitherto wholly neglected to pay the same or any part thereof.

"II. Plaintiff further shows that the indebtedness due by said Dubuque Savings Institution amounts to the sum of about one hundred and thirty thousand dollars. That the assets belonging to said institution and the assessment upon the capital stock of said institution, available and collectible, will not be sufficient to pay said indebtedness in full, but the liabilities of the stockholders to an amount equal to their respective shares of stock will be necessary to be enforced in order to meet such indebtedness in full. That all of said indebtedness was incurred during the time the said defendant was a stockholder of said Dubuque Savings Institution. That the amount of shares of said capital stock so held by said defendant is fifty shares, or the sum of five thousand dollars, for which plaintiff claims that defendant is liable in addition to the forty-five hundred dollars above alleged. Therefore, plaintiff prays judgment for ten thousand dollars, interest and costs."

The defendant answered in denial and set up the following affirmative legal and equitable defenses:

"1st. The defendant denies each and every allegation in said petition contained, and denies that said pretended incorporation ever issued any of its stock to this defendant, as averred, and that he ever was a member of the alleged incorporation, or was at any time the owner of any of the shares in its capital stock, as alleged.

"2d. This defendant, further answering, says that he never at any time, in writing, was a subscriber to the capital stock of the alleged incorporation, and never held any certificates of the capital stock of said alleged incorporation, and never was a member of said alleged incorporation, and never entered into any verbal agreement for the purchase of shares and of the said stock, or to become a subscriber therefor, within five years prior to the time of the commencement of this suit, and of the alleged assessment by said receiver.

"3d. This defendant further answering denies each and every allegation in said petition, and denies that he ever

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entered into the contract alleged in the petition with the alleged incorporation by which, as averred, he became the owner of fifty shares of the capital stock of the alleged incorporation, and defendant avers that the alleged incorporation never had a legal existence as a corporation; that its articles of incorporation were never filed in the office of the Secretary of the State of Iowa, nor was any notice ever published giving notice of the name of the corporation, the place of its business, the general nature of the business to be transacted, the amount of its capital stock and the time and conditions on which the same were to be paid in, the time of the commencement and termination of the corporation, by what officers or persons the affairs of the corporation were to be managed or conducted and the time of their election, the highest amount of indebtedness to which the incorporation was at any time to subject itself, and whether private property was to be exempt from corporate debts, nor was such notice ever recorded in the office of the Secretary of the State of Iowa; that said pretended incorporation consisted of R. A. Babbage, R. A. Babbage, Jr., Palmer Kellogg, Amos Sheffield, Geo. A. Blanchard, W. E. Wellington, W. W. Woodworth, John T. Hancock, J. Duncan, G. D. Wood, W. W. Luke, Charles Crocker, C. M. Woodworth, C. Bronson, Geo. L. Turner, John W. Ware, Jr., J. H. Gray, E. L. Clark, J. P. Scott and O. P. Shiras, as incorporators; that said individuals commenced and carried on and transacted business under the name and style of the Dubuque Savings Institution, and defendant avers that the same was not a corporation—was not organized as such, nor was the law in any sense as aforesaid complied with so as to create a corporation, but defendant avers that the same was a copartnership; that the proceedings in the name of the State of Iowa, upon the relation of the Attorney General of the State of Iowa, to wind up the affairs of the alleged incorporation, by which the said Stewart was appointed receiver, were unauthorized, null and void, and the said Stewart has no right or just authority to make an assessment upon the alleged shares of stock, as averred.

“4th. This defendant further answering says, in answer to

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the second count of the petition, wherein the pretended receiver, Stewart, claims to recover the sum of \$5,000 over and above the actual amount of the alleged subscription to the capital stock of the averred corporation, that such claim or liability (if any such exists) is no part of the assets of the so-called Dubuque Savings Institution, and this defendant is not liable for the same to the said pretended corporation or the alleged receiver thereof.

"5th. This defendant says further, by way of equitable answer to said petition, that the said plaintiff cannot have and maintain his action against him at law, but that the same, as appears by said petition, is solely cognizable by a court of equity; that in no event could the defendant be liable to a greater amount than the alleged unpaid subscription to the capital stock of said averred corporation; that a payment in full of all the subscription to the capital stock of the alleged corporation would greatly exceed the indebtedness of the alleged corporation; that no stockholder is liable to contribute to the payment of such indebtedness beyond another stockholder, and is not liable beyond what is sufficient to pay such indebtedness, and not liable to that extent unless such indebtedness exceeds the amount of such subscriptions; that said Stewart has settled with and received from a large number of the said stockholders about 20 per cent upon the amount of their subscription to said stock, and has discharged the same from further liability upon the said subscriptions. The names of such stockholders and the amount of the stock this defendant is not able to state; and the said Stewart now seeks to hold defendant for the full amount of his alleged subscription, or stock, and defendant avers that it requires a court of chancery to find the amounts due from each shareholder and settle and adjust the same.

"This defendant further states that the capital stock of the alleged corporation is divided into 1,000 shares of \$100.00 each; that the articles of the alleged corporation purport to be filed under the general incorporation law by which the maximum corporate indebtedness is limited to two-thirds of the amount of the capital stock; that the maximum corporate

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indebtedness of the alleged bank is accordingly limited to \$66,666 and 66-100; that for all indebtedness in excess of said amount the officers of said bank, participating in its management at the time this excessive indebtedness was incurred, would in case of a deficiency of assets be primarily liable; that the indebtedness of said bank was, as this defendant is informed, at the time of the appointment of said receiver, \$117,000.

"That the indebtedness incurred in excess of the legal corporate indebtedness was accordingly about \$50,000, and the officers of said bank (so called) participating in its management at the time the excessive indebtedness was incurred, are abundantly good and responsible for the amount.

"This defendant further says that the assets of said alleged bank, if properly collected, are sufficient to pay the legal corporate indebtedness of said concern without subjecting the stockholders to any liability.

"Par. 3. This defendant says that more than \$45,000 of the legal indebtedness of the so-called bank has been paid by said receiver, and that almost the entire amount of the outstanding indebtedness of the alleged corporation is owned by the said officers of the alleged bank, for which they have paid about 50 cents on the dollar, amounting to about \$70,000, said officers having full knowledge of the excessive indebtedness when said excessive indebtedness was so incurred and the business of said alleged corporation so mismanaged.

"Par. 4. This defendant further avers that the said Stewart, during the time he has been acting as receiver, has been speculating in the indebtedness of the so-called bank, and has purchased a large amount thereof at 50 cents on the dollar, and has appropriated the assets of the bank to take up the same at the face thereof, and pretends that the same was and is an indebtedness of the bank (so-called).

"Par. 5. This defendant avers that there is a large amount of uncollected claims in the hands of plaintiff, the proper assets of the said corporation, against solvent persons, adequate to pay all indebtedness of the so-called bank without calling upon any stockholders, which the said Stewart refuses

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and neglects to collect (after request) and apply to the payment of the debts of said alleged corporation.

"Par 6. This defendant avers that the said plaintiff is fraudulently endeavoring to collect from the stockholders of said bank (so-called) the unpaid amount of their subscriptions to pay off said illegal indebtedness so held by him and the said officers of said bank, all of which has been purchased by them at 50 cents on the dollar with a full knowledge that the same was an illegal indebtedness as aforesaid.

"Par. 7. This defendant avers that the officers of said bank (so-called) at the time of the incurring of the said illegal and excessive indebtedness, and who participated in the management and mismanagement of the alleged bank, and who carelessly, negligently, fraudulently, and illegally permitted said so-called bank to become so indebted beyond the limit fixed by law, and who without authority and in violation of law contracted the said excessive indebtedness of the alleged bank, and who now hold so large an amount of said indebtedness as averred, are John T. Hancock, W. E. Wellington, W. W. Woodworth, C. M. Woodworth, Geo. B. Hamilton and F. W. H. Sheffield.

"Therefore, this defendant asks that the said John T. Hancock, W. E. Wellington, W. W. Woodworth, C. M. Woodworth, Geo. B. Hamilton and F. W. H. Sheffield, and all others interested in the alleged bank, may be made parties to this suit that a fair and just accounting may be had between the said officers of said alleged bank and the said receiver and the shareholders thereof, that the legal indebtedness of the alleged bank may be determined; that no assessment shall be made for the payment of any indebtedness over and above the said legal amount of corporate indebtedness, and that the indebtedness of the alleged bank now held by the said officers of said bank may be declared null and void as against the alleged stock and shareholders, and that the said receiver, the plaintiff, shall only be allowed the amount paid by him for said stock as against the alleged bank and the shareholders thereof; that the said Stewart, plaintiff as aforesaid, may be compelled to collect all amounts due from the officers

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of said alleged bank, and apply all assets of the bank to the payment of its debts, before proceeding against the shareholders in the alleged bank, and for such other relief as is equitable and just."

The plaintiff demurred to division 5 of defendant's answer, presenting his equitable defense to the action, on the ground, among others, that it does not state facts sufficient to constitute an equitable defense to the action, and that it appears, from the equitable answer, that defendant has a full and adequate remedy at law for the matters therein set out.

The demurrer was sustained, and from the court's judgment thereon defendant appeals.

Pollock & Shields, for appellant.

H. B. Fouke and W. J. Knight, for appellee.

BECK, J.—The demurrer, it will be observed, is directed against the equitable answer only; the sufficiency of the legal defenses pleaded is not questioned.

I. The indebtedness of the corporation in excess of its assets, or to such an extent as to render defendant liable over and above the sum due on his unpaid stock, to an amount equal to the shares held by him; the assessment upon defendant's stock by the receiver, under direction of the court appointing him; all questions affecting the jurisdiction of the court and the receiver; the facts of subscription by defendant; his holding stock at the time the indebtedness of the corporation accrued, etc.; the binding effect of any subscription made by defendant, are all put in issue by that part of the answer which sets up legal defenses to the action.

II. The equitable answer presents the following defenses, briefly stated, which defendant insists are cognizable in chancery:

1. No stockholder is liable to contribute to the payment of the indebtedness of the corporation beyond another stockholder.

2. Settlements by the receiver with other stockholders for sums less than was due from them.

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3. The illegality of a part of the alleged indebtedness of the corporation which renders it invalid.

4. The sufficiency of the assets of the corporation to pay its debts.

5. The fraud of the receiver and the officers of the corporation in purchasing the claims against the bank at a discount and exacting payment at their face.

6. Neglect of the receiver to discharge his duty.

7. The illegal and fraudulent acts of the officers of the corporation in contracting debts whereby the bank was intended to be bound beyond the limits of its indebtedness as prescribed by law, in making dividends unlawfully, in appropriating the money of the corporation, etc., etc.

III. We will first consider the equitable answer in its application to the first count of the petition. It does not deny

^{1. RECEIVER:} the proceedings under which the receiver was appointed, and that an assessment was made upon the stock of defendant, under direction of the court. The jurisdiction of the court and of the receiver being conceded, and the fact of assessment being admitted, it is to be regarded as *res adjudicata*. All questions as to the indebtedness of the bank and the like, involved in the assessment, or which it was necessary to determine before making it, must be presumed to have been adjudicated, and defendant is bound thereby. Any errors made by the court, in the proceedings appointing the receiver and controlling and directing his action, must be corrected by proper application to the court or by appeal from its orders or decisions as provided by the law applicable to such cases.

The errors or irregular proceedings of the receiver must be corrected by the court having control of his action. None of these matters can be set up in an action brought by him under the direction of the court.

Authority is found for the proceeding wherein the receiver was appointed, and under which he is proceeding to wind up the affairs of the bank, in Code, §§ 1571, 1572, 2905.

The other matters set up in the equitable answer are applica-

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ble alike to each count of the petition. They will hereafter be considered as applicable to each.

IV. The second count of the petition seeks to recover on the ground that the assets of the bank and the assessments upon the stock of the institution will not be sufficient to pay its indebtedness, and that the liability of the stockholders to an amount equal to their respective shares of stock must be enforced to meet such indebtedness. It is not averred in the petition that these facts were adjudicated by the court in the proceedings appointing the receiver, if such an adjudication would be proper, nor did such adjudication appear from the equitable answer. But if no such adjudication was made, or if made without authority, the facts can be established under the answer setting up the legal defense. Certainly, if the payment of the debts of the bank may be made out of its assets and assessments upon the shares of stockholders, no liability exists as claimed in the second count of the petition. It will be remembered that the liability sought to be enforced in this count is covered by Article 8, § 9, of the Constitution.

V. We will now consider the several defenses pleaded in the equitable answer as the same are applicable to both counts of the petition. They will be referred to in the limitation of order we have above stated them.

It surely cannot be the law that one stockholder cannot be required to contribute to the payment of the debts of the corporation beyond a proportional sum collected from another. If this were so, the circumstance of one insolvent stockholder would defeat the provision of the law and the constitution for the benefit of creditors of the incorporation. Nothing further need be said as to the first defense of the equitable answer.

VI. The fraudulent acts of the receiver and officers of the incorporation can be no defense to the action. If it were so, this too would defeat the constitutional provision for the benefit of creditors. For the same reason the neglect of the receiver affords no defense to the action. This view disposes of the second, fifth, sixth and seventh defenses set up in the equitable answer.

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VII. It may be that the acts of the receiver and stockholders set out in these defenses would afford a cause of action ~~s. : :~~ against them by defendant, and it may be, too, ~~equities be-~~ that he would have his action against any stockholder for contribution, who has not contributed equally with him in proportion to the stock held by each. But if such be the law he cannot delay the collection of the amount for which he is liable for the benefit of the creditors of the bank. His liability is separate from that of the other stockholders—he is not jointly liable with all or each. The depositor or other creditor of the bank would be exposed to great hardship were he required to wait the slow progress of an equity action, wherein all the stockholders are parties, brought to settle the equities existing between them growing out of their liabilities and relations as associates in the corporation.

VII. The matters set out in the third and fourth defenses, viz: the illegality of a part of the debts of the bank, and the sufficiency of the assets of the corporation to pay its indebtedness, if adjudicated in the proceedings wherein the receiver was appointed, cannot be pleaded as a defense to the first count of the petition. If there has been no adjudication to the effect that the liability of the stockholders, over and above the amount of the shares created by the constitution, must be enforced for the payment of the debts of the bank, the defendant can, under the legal defenses pleaded by him, show the conditions and facts set up in the parts of his equitable answer now under consideration. They afford a defense at law.

It follows from these considerations that the District Court correctly ruled in sustaining plaintiff's demurrer to defendant's equitable answer. The judgment of the court below is affirmed and the cause will be remanded for further proceedings required by law.

AFFIRMED.

ADAMS, J., having been of counsel in this cause took no part in its decision.

ON REHEARING.

BECK, J.—A rehearing was granted in this case on the

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ground that it was prematurely submitted, and our decision was announced at a time when counsel supposed further argument would be considered. It is not necessary to state the circumstances leading to the submission of the cause at that time. We readily reached the conclusion that a rehearing ought to be granted, for, in a court of last resort, every opportunity should be given for a full argument of all cases decided therein.

Additional arguments have been submitted upon the rehearing, and the cause has again been considered by the court. Our re-investigation, with the additional aid afforded by the new arguments, has strengthened our confidence in the conclusions of the opinion heretofore filed. We deem it unnecessary to add anything to what we have already said. We find nothing in the arguments recently filed, or in the authorities cited therein, meriting special notice. The case is fully considered in our opinion heretofore filed. We adhere to the conclusions therein announced.

THE EQUITABLE LIFE INS. CO. ET AL V. SLYE ET AL.

1. **Mechanic's Lien: PRIORITY: MORTGAGE.** A mechanic's lien for materials furnished for the improvement or enlargement of a building does not take priority over an existing mortgage, and this rule prevails even though the building be changed so that very little of the original structure remains.
2. **—: EMBRACES WHOLE STRUCTURE.** The party who furnishes material or machinery for a building by the filing of his lien acquires one upon the entire structure, and what he furnishes becomes in turn subject to all liens of his fellow mechanics which attached earlier.

Appeal from Polk Circuit Court.

WEDNESDAY, APRIL 18.

ACTION to foreclose a mortgage executed to the plaintiffs by J. A. Slye and others, who are made defendants. Others still are made defendants as holding liens upon the mortgaged

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property. The question involved is as to whether the mortgage has priority over certain mechanic's liens held respectively by the defendants, McDonald & Meara, Brooks, Wilson & Stein, and Martin Tuttle. The facts are stated in the opinion. Decree for plaintiffs, establishing the mortgage as paramount to all other liens. The defendants, McDonald & Meara, Brooks, Wilson & Stein, and Tuttle, appeal.

Barcroft, Given & Drabelle, for McDonald & Meara.

Phillips, Goode & Phillips, for Brooks, Wilson & Stein.

Wright, Gatch & Wright, for Tuttle.

J. S. Polk, for appellees.

ADAMS, J.—The mortgage was executed upon certain lots in the city of Des Moines. Upon them was standing at the time ^{1. MECHANIC'S} a paper mill. Both the building and machinery ^{lien: priority:} were considerably out of repair, and soon after the execution of the mortgage the mortgagors removed nearly all the old building, and erected a new one in its place. A portion of the machinery was removed and new machinery supplied. The defendant, Tuttle, furnished labor and materials for the foundation of the building. The defendants, McDonald & Meara, furnished labor and materials in the construction of a boiler, steam gauge, etc. The defendants, Brooks, Wilson & Stein, manufactured at their shop, and sold and delivered to the mortgagors for the use of the mill, an engine and pump.

The defendants, Tuttle, and McDonald & Meara, filed statements claiming a mechanic's lien respectively upon the building and land. The defendants, Brooks, Wilson & Stein, filed a statement, claiming a mechanic's lien upon the engine and pump by them furnished, and upon the building and land.

That the defendant mechanics are entitled to liens upon the building and land (unless they have waived them) there can of course be no doubt. That the mortgage is paramount in respect to the land is equally certain. Whether the mortgage

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is paramount with respect to the building also, or if not, with respect to the particular thing furnished, is the question in this case.

If the paper mill, including both building and machinery, had been wholly erected after the execution of the mortgage we should think that, for the labor and materials employed in its construction, the mechanics would have a lien upon the mill paramount to the mortgage; and we have to say that the evidence is such as to leave our minds in some doubt as to whether the mill should not be regarded as a new one. Very little, if any, of the old building remains externally. The flooring on the first floor was left, and a part of the old foundation. A frame part standing over the machinery was left for a time, but has since been removed. The value of the mill, however, consisted mainly in the machinery. As that remained to a considerable extent, and new walls were built around it, we think that the mill could not properly be said to have originated in those walls. If we are correct, then what was done was done by way of making additions, or reconstruction of some constituent parts, and substitution of some new machinery; and we have a case not essentially different from that of repairs or enlargement of a building upon which there is a mortgage.

Some of the appellants claim that, even in such a case, the mechanic's lien in respect to the building should be held to be paramount. And it is indeed provided in Sec. 2141 of the Code, and Sec. 1855 of the Bevision, that "the lien for the things aforesaid (the materials), or work, shall attach to the buildings, erections, or improvements for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage, upon the land upon which the same is erected or put." If reference is there made to repairs or enlargement of a building, then the appellants are certainly correct. The section, by its terms, points back to other provisions. "The lien for the things aforesaid" is the lien provided in section 2130 of the Code and 1846 of the Revision. By reference to those sections, it will be seen that a lien is given for any work done or materials furnished "for any

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building, erection," etc. The language is certainly broad enough to cover repairs or enlargement of a building.

It was held, however, substantially, in *Getchell & Tichenor v. Allen*, 34 Iowa, 559, that it was not the design of the statute to make a mechanic's lien for repairs or enlargement paramount to an existing mortgage. If the mechanic's lien for such things can become paramount, it will be seen at once that the value of a mortgage upon improved property would be greatly diminished.

A mechanic's lien can, it is true, become paramount to a mortgage executed upon a partially erected building, provided the work be done or materials furnished for the purpose of completing the building. This is the plain provision of the statute, and to our minds it is not unreasonable. Whoever takes a mortgage upon a building which is in process of erection, should assume that the mechanics' work is to go forward, and he may form some estimate of the amount that will be required. The same is not true in regard to repairs or enlargements. They cannot be definitely anticipated, nor are they subject to any calculable limitation.

It is not to be presumed that the legislature would enact a statute which would go far to impair, if not destroy, the value of mortgages upon improved property. But whatever doubt there might have been originally as to whether the statute is susceptible of the construction given it in *Getchell & Tichenor v. Allen*, important rights have attached to property under that construction, and we think that no sufficient reasons have been suggested for departing from it. The foregoing considerations dispose of the claims of priority made by Tuttle and McDonald & Meara.

As to the claim of Brooks, Wilson & Stein, evidence was introduced tending to show that the engine and pump furnished by them could be removed without detriment to the remaining property. They claim, therefore, a specific lien upon them, and the right to remove them. But they have been attached to the other property and have become a part of the mill. It may be said, also, that they are serving the specific purpose for which they were made. It is to be pre-

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sumed that their value if removed would be less than the depreciation of the mill which would be caused by their removal. It is not certain then but that the claimants' lien upon the mill, which is undisputed, although subordinate to the mortgage, is worth more with the engine and pump in their place in the mill, than a paramount lien upon the engine and pump removed from the mill. Whether this be so or not, it is the policy of the law to prevent waste of property; and the mill must be kept together and sold together for the satisfaction of all the liens, unless there is some rule of law to the contrary.

If the mill had been wholly erected after the execution of the mortgage, so as to make the mechanics' liens clearly paramount with respect to the mill, the different mechanics would have had general liens upon the mill and not specific liens upon the particular things furnished by them respectively, and the mill with all its machinery, in such case, would, if it became necessary to enforce the liens, be sold together for the payment of all the liens paramount to the mortgage, and according to their respective priorities. If several mechanics, as a carpenter, plasterer, painter, and paper hanger, erect a house upon mortgaged land and thereby acquire liens paramount to the mortgage in respect to the house, it would be folly to remit each for his security to the particular work done or materials furnished by him. If the plasterer's work is done before that of the painter, his lien not only covers the whole house but becomes paramount to that of the painter even upon the paint. In no other way could any reasonable security be furnished generally, and furthermore, this is clearly the meaning of the statute. "Every mechanic * * * who shall perform any work or labor upon * * * any building, erection, or other improvement * * * shall have * * * a lien upon such building, erection, or improvement." Sec. 2130 of the Code, Sec. 1846 of the Revision. If he performs labor upon a building he shall have a lien upon the building. If he performs labor upon some other kind of improvement, as a railroad, he shall have a lien upon the

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railroad. By the same section it is provided that if he furnishes machinery for a building he shall have a lien upon the building. If he furnishes machinery for some kind of an improvement other than a building, he shall have a lien upon the improvement whatever it may be.

The pump and engine were furnished for the mill, and became a part of it. We must then hold that they became subject to all the liens upon the mill, and according to their respective priorities. We are of the opinion, therefore, that the decree of the Circuit Court should be

AFFIRMED

ALTMAN & CO. V. FARRINGTON ET AL.

1. Practice in the Supreme Court: TRIAL DE NOVO. Where no motion was made in the court below to have the case tried on written evidence, and the evidence is not certified by the trial judge, the case will not be tried *de novo* in the Supreme Court.
2. ——: FINDING OF FACT: EVIDENCE. A finding of fact will not be disturbed because not sustained by the evidence, when there is evidence tending to support it.

Appeal from Cedar District Court.

WEDNESDAY, APRIL 18.

ACTION to recover certain real estate. The plaintiff's title is based on the foreclosure of a mortgage and a sheriff's deed, made in pursuance of a sale under said foreclosure proceedings. The defendant's title is based on a sale for taxes, and a deed made in pursuance thereof. The petition alleged that the tax title under which the defendants claim one-half of the land in controversy was void for the reason that the taxes had been paid.

The plaintiffs also sought to foreclose a mortgage as to the other half of the land, said mortgage having been executed by the defendants, and it was claimed that the title of Betsey

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Farrington under the tax sale was fraudulent and void as against such mortgage, because her husband, Philip Farrington, had furnished the money with which the said Betsey procured said title.

The answer denied the allegations of the petition, and alleged that said Betsey had purchased said tax title with her own means.

There was a trial to the court, who found for the plaintiffs, and rendered judgment accordingly. The defendants appeal.

I. N. Numan and Clark & Haddock, for appellants.

A. B. Oakley and Piatt & Carr, for appellees.

SEEVERS, J.—No motion was made in the court below to try this case on written evidence, nor is the evidence certified by the judge of the District Court, and the appellee insists that there cannot be a trial *de novo* in this court, under sections 2741, 2742, of the Code. In this view we concur. *Moses v. Continental Ins. Co.*, 40 Iowa, 441. Such being true the only question before us must arise on the legal errors duly excepted to in the court below, and assigned as error here. The only error assigned is that “the court erred in entering judgment for plaintiffs, said judgment not being sustained by the evidence.”

There was evidence showing that, as to half the land in controversy, the tax title was void because the taxes had been paid. Code, section 897. As to the validity of the tax title to the other half of the premises the plaintiffs gave evidence tending to show that the consideration with which it was purchased was furnished by the defendant, Philip, and that the whole business was conducted by him. The evidence also tended to show that the transaction was fraudulent. Under these circumstances we cannot disturb the finding below. As we have repeatedly said, the question before us is not whether the finding of fact is, in our opinion, sustained by the evidence but it is was there evidence tending to support such finding. In our opinion, the court below

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could have well concluded, under the evidence, that the placing the tax title in the name of Betsey Farrington was a fraud on the plaintiffs.

AFFIRMED.

45	622
98	196
45	622
106	230

HUGHES v. STANLEY.

1. **Contract: COMPETENCY OF: CUSTOM.** It is competent for parties to enter into a contract in accord with an established usage or custom recognized by both, and the contract will be binding upon them.
2. _____. The present case distinguished from *Johnson v. Brown*, 37 Iowa, 200.
3. _____. RECEIPT FOR GRAIN: WAREHOUSEMAN. While the receipt of a warehouseman for grain received by him may be evidence indicating that the transaction is a sale, yet it will not be received to defeat the conditions of an oral agreement between the parties.
4. **Practice in the Supreme Court: MOTION TO STRIKE BILL OF EXCEPTIONS.** A motion will not lie to strike the bill of exceptions on the ground that it does not correctly present the evidence.

Appeal from Marshall District Court.

WEDNESDAY, APRIL 18.

ACTION at law. The petition is in two counts. The first claims to recover for 303 5-6 bushels of wheat sold and delivered by Henry Hopkins to defendant at the market price, alleged to be \$1.25 per bushel. It is expressly alleged that the contract of sale was not in writing and that Hopkins transferred his interest in the claim to plaintiff. The second count is as follows:

"In the month of May, 1872, and for six years prior and up to that date, defendant was a warehouseman and operating a warehouse in Marshalltown, Iowa.

"That it was the custom of defendant and others during said time, to receive grain into his elevator and mix the same with other grain belonging to defendant and ship and sell the same as his own, charging the person leaving the same one

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cent per month on each bushel until such time as the depositor elected to take grain of like grade and kind, or its value in money at market price in Marshalltown at time of election and demand.

"That in the month of October, 1871, Henry Hopkins placed in defendant's warehouse two hundred and three and 5-6ths bushels of No. 1 "T" Spring wheat. Said wheat was placed in said warehouse under and in compliance with said custom, and it was agreed, not in writing, between defendant and said Hopkins that said wheat was placed in said warehouse upon the terms of the custom before set forth.

"About January 1st, 1872, said Hopkins sold, verbally, all his right in the wheat deposited as aforesaid and said agreement to plaintiff, which is now owned by him and unpaid.

"That at various times before the commencement of this suit plaintiff demanded of defendant said wheat and wheat of like grade and kind and value of same at time of such demands, and offered to pay storage due on same, but defendant at all times refused to deliver the wheat, or wheat of like grade and kind, or to pay its market value at time of demand, less storage. At the time of demand the wheat was worth \$1.25 per bushel. Said wheat was not placed in a separate bin, but was mixed with other wheat belonging to defendant by defendant, and by him shipped and sold before said demand was made."

The answer, after a general denial of the allegations of the petition, sets up, in a second count, the following defense:

"For other and further answer, defendant avers that on or about the 21st of October, 1871, one Hopkins, the assignor of plaintiff, stored in defendant's elevator 203 5-6 bushels of No. 2 Spring wheat, and at the time of storage said grain was delivered without any express agreement or contract whatever, relying on the well known usage of defendant's business, which was in substance this:

"A so-called wheat ticket was delivered to the depositor, containing upon it the number of bushels and kind of grain delivered, and a stipulation that same was at owner's risk from fire; that the grain should be put in defendant's ware-

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house and one cent per month per bushel should be paid as storage till the grain was called for by depositor; that the defendant should not be required to place the grain so stored in a separate bin, nor keep on hand the same identical grain; that the identity of the grain was immaterial; that it would be sufficient to store in the same bin with other grain of like grade and quality so long as convenient, and the same identical grain might be shipped out and sold, if convenient; that the same number of bushels of same grade (in defendant's warehouse), though not identical, should at all times stand in the place of and be considered and treated as the identical grain belonging to depositor, subject to his call, owned by him, and at his risk with all the incidents of an ordinary storage for hire by bailor with a warehouseman; that on presentation of ticket the grain, on payment of storage, should be re-delivered to depositor, unless he elected to sell the same. In case, however, of loss by fire before so called for or sold by depositor, then the defendant (if he had an equivalent amount of same grade of same grain on hand in the warehouse and it was destroyed by fire), was to be exempt from liability for such loss, and the depositor was to bear the loss the same as if his own identical grain still owned by him, stored in a separate bin, had been burned in the warehouse, and defendant's sole liability and undertaking was to produce and deliver to depositor, when called for, the same amount of the same kind and grade of grain, if the same had not been destroyed by fire at the time called for.

It was also understood that the reception by the depositor of such wheat ticket was equivalent to a writing of above substance and effect signed by depositor.

And defendant avers that he has faithfully on his part performed his part of such usage and implied understanding—that no call was in fact ever made for the grain aforesaid prior to the 4th of May, 1872.

And on said 4th day of May, 1872, while the defendant was under only the special liability aforesaid of an ordinary warehouseman, with special release from damages by fire—the grain being strictly at the risk of the depositor as to fire—in

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the great fire at Marshalltown the warehouse of the defendant with the grain so held for delivery on demand was entirely consumed without the fault or negligence of the defendant."

To the second count of defendant's answer plaintiff demurred. The demurrer was overruled.

The cause was submitted for trial to a jury. A verdict and judgment was had for defendant. Plaintiff appeals.

Caswell & Meeker, for appellant.

Boardman & Williams, for appellee.

BECK, J.—This cause was submitted by counsel at the June term, 1874. From an oversight of the clerk it was not entered upon our submission dockets and therefore did not come into the hands of the court, and of course no decision therein could be made. It did not reach us until the present term, when it was entered upon our dockets and submitted for decision of the court.

I. The first point of the case we shall consider, involves the correctness of the ruling of the court upon plaintiff's demurrer to defendant's answer.

The first count of the petition sets up a verbal contract of sale of the wheat, the second the delivery of the wheat to defendant, under a usage, by the verbal agreement of the parties. It is alleged that, under this usage, the defendant received and so appropriated the wheat that the law implies a contract of sale. The second count of the answer sets up a usage or custom which was known to the parties, under which the wheat was delivered, to the effect that it should be stored with other grain in common bins and that the same number of bushels of other grain of the same grade should be regarded as the property of plaintiff and that defendant was not to be liable for its loss by fire. The pleadings show a usage and custom of trade, known to plaintiff, with reference to which the contract was made. It is, surely, competent for parties so to contract. They may make their contracts to accord with customs or usages and with reference thereto. This is an elementary principle of the law. The

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second count of plaintiff's petition is based upon a contract made with reference to a custom.

The answer alleges no terms or conditions of the contract growing out of or dependent upon the custom recited, which the parties were not entirely competent to adopt. The demur-
rer was properly overruled.

II. It is insisted that certain evidence was erroneously admitted. It tended to support the custom or usage pleaded by defendant in his answer, and his allegation that the contract under which the grain was received was made with reference thereto. It was properly admitted under the issues found upon the second count of defendant's answer.

III. The instructions, in our opinion, fairly presented to the jury the issues raised by the pleadings and the rules necessary to reach a correct determination thereof. The issues of fact, as found, involved the terms of the contract made by the parties whether they were of the character claimed by plain-
tiff or as claimed by defendant. The existence and effect of the usage or custom under which the contract was made were involved in this issue. If they were found as alleged by plain-
tiff, he was entitled to recover; if as set up in the answer, defendant should recover. It may be that the issues could have been more clearly and directly presented to the jury than was done in the instructions given, but we think no ground exists for holding them prejudicially defective.

IV. It is insisted by plaintiff that the verdict is not sup-
ported by the evidence. We are of a different opinion. The jury, we think, were justified in finding the contract to be of the character alleged in defendant's answer and the facts to be such as are therein pleaded.

V. The plaintiff relies upon *Johnston v. Brown*, 37 Iowa, 200. That case is clearly distinguishable from the one before us. In this case the terms of the contract, as found by the jury, are to the effect that the grain could be mixed with other grain in store, and the proper number of bushels in the warehouse should be regarded as plaintiff's property and be held by defendant free of any risk. No such facts or contract were involved in the case cited.

Cramer v. The City of Burlington.

The receipt or warehouse ticket contains matters upon which the position could well be taken that the delivery of the grain to defendant amounted to a sale, and that such ticket amounts to a contract to that effect. But plaintiff declares on no such contract, or at least does not declare upon the ticket as embodying that contract, but avers that it was oral. He cannot, in this cause, rely upon the ticket as presenting the contract under which he claims to recover.

VI. Defendant, since the cause has been pending in this court, filed a motion to strike the bill of exceptions, and especially the evidence embodied in it, on the ground that the evidence is improperly incorporated therein. The objection does not appear upon the face of the record, but is shown by affidavits. The record cannot be contradicted in this way. If the facts be as alleged by defendant, he should have had the record amended upon suggestion of diminution, or if the record as it appears in the court below requires change to make it correspond with the facts, proper steps should have been there taken to amend it. The motion is overruled.

AFFIRMED.

CRAMER v. THE CITY OF BURLINGTON.

1. **Evidence: NEGLIGENCE: SIDEWALK.** In an action against a city for damages on account of injuries caused by the negligent condition of a sidewalk, evidence tending to show that its condition has been improved subsequent to the accident is not admissible as an admission of negligence by the defendant.

Appeal from Des Moines Circuit Court.

WEDNESDAY, APRIL 18.

THIS is an action for personal injuries sustained by plaintiff by falling from a sidewalk which he alleges was negligently and improperly constructed, and negligently permitted by defendant to remain out of repair. The answer denies the

45	627
85	198
45	627
109	221
45	627
4114	534

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alleged negligence, and avers that plaintiff's injuries were received by reason of his own negligence. There was trial by jury, verdict and judgment for plaintiff. Defendant appeals.

J. & S. K. Tracy, for appellant.

Blake & Hammack, for appellee.

ROTHROCK, J.—I. This cause has been already twice before this court upon appeals by defendant. See 39 Iowa, 512, and 42 Id., 315. In both of the former appeals the judgment was reversed because of errors in the instructions of the court to the jury. In the present appeal it is urged that the court below erred in admitting improper evidence, and erred in the instructions given to the jury, and in refusing to give certain instructions asked by defendant.

The plaintiff was injured by falling from an offset in a sidewalk, in the night time. This offset had been protected by a board, one end of which was nailed to the corner of a building, and the other end nailed to a post. No one saw the plaintiff fall. He left a saloon, close by the offset in the sidewalk, and was shortly afterwards found, badly injured, having fallen off the sidewalk at the offset to the ground below, a distance of eight or ten feet. The plaintiff was not examined as a witness upon the trial, it being alleged that his mind was so impaired by the accident as to render him incapable of giving testimony. The evidence in the case was largely directed to the condition of the barricade or protection at the offset, at the time of, and before the accident. The main contest was as to whether the protection was reasonably safe and sufficient, or whether it was of such an insufficient and unsafe character as to render the city liable for negligence.

Upon the second trial of the cause the plaintiff called as a witness one G. S. Grant, who had been a juror upon the first trial, and who at that time as such juror examined the sidewalk, and asked him to state the condition of the sidewalk at the place where the board was nailed across from the post to the building. Objection was made to showing the condition of the sidewalk at a time long subsequent to the accident.

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The objection was overruled and the witness was permitted to answer the question, upon the statement of the plaintiff's counsel that he expected to show that the condition of the sidewalk when examined by the witness was the same as when the accident occurred. We held that in this action of the court there was no error. Upon that appeal the abstract did not show that it contained all the evidence, and it was held proper to presume that the offer was performed, or at all events, as the testimony was properly admitted under the said offer of plaintiff, defendant should have asked that it be stricken out, if during the trial proper facts for its retention were not shown. 42 Iowa, 315.

At the last trial the plaintiff introduced as a witness one Henry Stensbeck, who testified that he was a juror upon the 1. EVIDENCE: first trial of the cause, and at that time made an negligence: examination of the place where the accident sidewalk. occurred, and he was asked how the board was fastened at the time of the first trial. The answer was: "Well, it was nailed up different from before; it was nailed up with a block where the board was nailed on."

Objection was made to the question and answer, because the after condition of the barricade, whether put up more securely or otherwise, was incompetent to show, or tend to show, negligence in the city, as to the condition of the sidewalk at the time the accident happened. The objection was overruled, and the witness was permitted to further answer as to the condition of the protection at the time of the first trial, showing that it was then more securely fastened than at the time of the accident. We think this ruling of the court was erroneous. Counsel for appellee contend that the fact that a change was made, "is very strong evidence that the parties making the change thought there was something the matter with it."

This evidence must have been received and considered as an admission upon the part of the city that there was negligence in the manner the sidewalk was protected at the time of the accident. Conceding that the act or declaration of an officer of a municipal corporation, made about a matter within the

Cramer v. The City of Burlington.

scope of his official authority, may be evidence against the city, yet it is well settled that such act or declaration must be contemporaneous with the injury complained of, and part of the *res gestæ*. This rule is applicable, also, to private corporations, and to all cases where it is sought to charge a party by the acts or declarations of his agent or employe. See *Treadway v. The S. C. & St. P. R. Co.*, 40 Iowa, 526, and authorities there cited.

In view of the fact that this cause has already been tried three times in the court below, we have endeavored to find some ground upon which this ruling can be sustained, but are unable to do so. It cannot be said to be so unimportant a fact as to be error without prejudice. We can well believe if counsel for appellee urged before the jury that the fact that the barricade or protection was made more safe and secure after the accident should be taken as an admission that it was at the time of the accident unsafe, it did have a material bearing with the jury in determining an important question in the case. That such claim was made in the court below we assume from the fact that it is made here. In view of a re-trial of the case we have carefully examined all the other assignments of error and the argument in support therof, and are of opinion that the rulings of the court were correct. It is unnecessary to enumerate or discuss them here.

For the error in the admission of the evidence as to the condition of the sidewalk at the time of the first trial, the judgment will be

REVERSED.

SUPPLEMENTAL OPINION.

ROTHROCK, J.—After the foregoing opinion was filed, and within the proper time, appellee filed a petition for re-hearing. An additional abstract of the evidence was filed at the same time, from which it appears that the objectionable testimony was admitted upon the statement of plaintiff's counsel that they expected to prove the condition of the protection to the sidewalk was the same when examined by the witnesses as it was at the time of the accident. The additional abstract also

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contains evidence tending to show that the condition of the protection was not changed.

It is perhaps unfortunate for the plaintiff that we did not have this additional abstract before the submission of the cause in this court. It is sufficient to say that we cannot consider it upon a re-hearing. When a cause is finally submitted to the court upon an abstract which is satisfactory to the parties, the unsuccessful party cannot be allowed to present an additional abstract upon the re-hearing.

REVERSED.

RYAN & Co. v. MULLINIX ET AL.

45 681
81 368

1. **Practice : TRIAL: CERTIFICATE OF CLERK.** Where a cause was ordered to be tried upon written evidence, it will be presumed to have been so tried, in the absence of a bill of exceptions or other statement signed by the judge, and this presumption will not be rebutted by a certificate of the clerk that the trial was upon oral as well as written evidence.
2. ——: DEFECT OF PARTIES: WAIVER. If the objection that one who is a necessary party is not joined in the action be not raised by demurrer, it will be deemed to have been waived.
3. **Fraudulent Conveyance: EVIDENCE.** Facts considered which were held to render a conveyance fraudulent.

Appeal from Decatur Circuit Court.

WEDNESDAY, APRIL 18.

THIS is an action in equity to set aside, as fraudulent, a conveyance of certain property from the defendant C. P. Mullinix to one A. C. Lockwood, and from Lockwood to the defendant Emma Mullinix. The court rendered a decree for plaintiffs, setting aside the conveyances named. The defendants appeal.

J. B. Morrison and Warner & Bullock, for appellants.

Harvey & Bro. and Wright, Gatch & Wright, for appellees.

Ryan & Co. v. Mullinix.

DAY, CH. J.—I. It is claimed that the evidence is not so certified that the cause can be heard here *de novo*. The cause 1. PRACTICE: was tried at the May term, 1876. On the second trial: certif. day of the appearance term, October, 1875, by agreement of the parties in open court, it was ordered that the cause be tried upon depositions and documentary evidence. It is not denied that the evidence is certified to this court by the clerk. But the appellees have filed the certificate of the clerk of the Circuit Court that the cause was tried upon deposition, record evidence and oral evidence, and that there is no certificate of the judge who tried the cause showing that the record contains all the evidence introduced on the trial. In view of this certificate, appellee insists that the evidence should have been certified by the judge, as provided in section 2742 of the Code. We cannot attach any importance or give any attention to this certificate of the clerk. It is no part of his duty to watch the progress of a trial, or to know that it was tried upon oral testimony. His certificate of that fact is entitled to no more consideration than would be the affidavit of an attorney present at the trial. The court having ordered that the cause be tried upon deposition and documentary evidence, in the absence of bill of exceptions, or other statement signed by the judge, the conclusive presumption is that it was so tried. The record cannot be made up or modified by a certificate of the clerk as to the manner in which the trial progressed.

II. Appellants claim that A. C. Lockwood is a necessary party, and that the cause must be reversed because he was not 2. ——: defect made a party defendant. If he is such necessary of parties: waiver. party the fact appears upon the face of the petition. Section 2648 of the Code provides that the defendant may demur to the petition where it appears upon its face "that there is a defect of parties, plaintiffs or defendants."

Section 2650 provides that "when any of the matters enumerated as grounds of demurrer do not appear on the face of the petition the objection may be taken by answer. If no such objection is taken it shall be deemed waived. If the facts stated by the petition do not entitle the plaintiff to any

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relief whatever, advantage may be taken of it by motion in arrest of judgment, before judgment is entered."

Whilst the language of this section differs slightly from the corresponding section (2878) of the Revision, we think its meaning is the same. It cannot be claimed that the facts stated in the petition do not entitle plaintiffs to any relief whatever. As the objection that there is a defect of parties was not raised by demurrer it is deemed waived.

III. Appellants insist that the court erred in the admission in evidence of an affidavit made by the defendant, C. P. Mullinix, April 9, 1872. The abstract does not show that any exception was taken to this action of the court.

IV. The evidence, we think, fairly sustains the decree. At the time the conveyances in question were made an action

^{3. FRAUDU-} LENT CONVEY-
^{ANCE: evi-} MULLINIX AND OTHERS, UPON A REPLEVIN BOND. ON
DENCE. THE 16TH DAY OF OCTOBER, 1874, C. P. MULLINIX
CONVEYED TO HIS FATHER-IN-LAW, A. C. LOCKWOOD, THE PROPERTY
IN CONTROVERSY, BEING THE UNDIVIDED ONE-HALF OF TWO LOTS IN
THE TOWN OF LEON, AND ABOUT TWO HUNDRED AND TWENTY-FIVE
ACRES OF LAND. ON THE 17TH DAY OF OCTOBER, A. C. LOCKWOOD
CONVEYED THIS PROPERTY TO EMMA MULLINIX, THE WIFE OF THE
DEFENDANT, C. P. MULLINIX. THE CONSIDERATION NAMED IN THESE
DEEDS IS \$3,500. ON THE 4TH DAY OF AUGUST, 1875, THOMAS
G. RYAN & CO. RECOVERED JUDGMENT AGAINST C. P. MULLINIX AND
THE OTHER SURETIES UPON THE REPLEVIN BOND, IN THE VAN BUREN
CIRCUIT COURT, FOR \$2,356.89. A TRANSCRIPT OF THIS JUDGMENT
WAS FILED IN THE OFFICE OF THE CLERK OF THE CIRCUIT COURT OF
DECATUR COUNTY.

Afterward, on the 3d day of September, 1875, the conveyances above named were recorded. All the other sureties upon the replevin bond are insolvent. C. P. Mullinix frequently declared that he intended to put his property beyond the reach of this claim, and we think the conveyances in question were made for that purpose. It is true C. P. Mullinix testifies that the conveyance to Lockwood was made in payment of a debt, without any fraudulent intent. And A. C. Lockwood testifies that the conveyance to him was in con-

Ryan & Co. v. Mullinix.

sideration of \$2,300, which C. P. Mullinix owed him, and mortgages and judgments against Mullinix, which he assumed, amounting to \$3,350, and that he conveyed the lands to his daughter because he wanted a home, and to provide for her and her children, as her husband was an habitual drunkard, and squandering his property. If \$3,350, the greater part of the consideration, was Lockwood's agreement to pay mortgages and judgments against Mullinix, it is unaccountable that the record of such mortgages and judgments was not produced, and that their existence was left to depend solely upon the statement of Lockwood. Emma Mullinix testifies as follows: "My father purchased this property to secure \$2,300 that my husband owed him and to secure himself a home, and a home for me and my children, because my husband was drinking and squandering his property. When my father conveyed this property to me I gave him for the same my note for \$1,400 and an obligation binding me to maintain him during his life, and to pay his traveling expenses and board at the rate of \$2 per week when he should be away from home."

The evidence shows that Lockwood was, at the time of this transaction, a man of small means, his property not exceeding in value five or six thousand dollars. It is not at all reasonable that he should discharge a debt of \$2,300, and assume liabilities of \$3,500, in consideration of this property, and the next day convey the whole of it to a daughter whose husband was squandering his property in drunkenness, in consideration of a note of \$1,400, and an agreement to maintain him during his life. The whole transaction bears unmistakable ear marks of fraud. The judgment of the court below is

AFFIRMED.

Miner v. Bennett.

MINER v. BENNETT.

1. **Fences: ON DIVISION LINES: RIGHTS OF ADJOINING OWNERS.** One who incloses land adjoining another's close, and does not own any part of the division fence, may throw any portion of such land open to common at pleasure.
2. **— : — : WHAT CONSTITUTE.** While a lawful fence is not necessary between adjoining farms to constitute occupation in severalty, still the partition fence must be such as will turn stock, and premises separated only by a hedge which is insufficient for that purpose must be considered as inclosed in common, within the meaning of section 1496 of the Code.

Appcal from Keokuk Circuit Court.

WEDNESDAY, APRIL 18.

THIS is an action to recover one-half the value of a fence, claimed to be a partition fence. The cause was tried by the court and judgment was rendered for forty-two dollars. The court gave the proper certificate necessary for an appeal. The defendant appeals. The material facts are stated in the opinion.

Woodin & McJunkin, for appellant.

C. M. Brown, for appellee.

DAY, CH. J.—The abstract contains all the evidence introduced upon the trial. It is entirely free from conflict, and establishes the following facts:

“ Plaintiff is, and ever since 1869 has been, the owner of NE. $\frac{1}{4}$ of 1, 77, 13, and defendant is and since then has been the owner of the SE. $\frac{1}{4}$ of said section. In 1869, and before the SE. $\frac{1}{4}$ was inclosed, plaintiff planted a hedge on the line between said two tracts, inclosing the NE. $\frac{1}{4}$, and soon afterward defendant built a rail fence on the west half of said line, which two years thereafter became worthless and was removed before either of the notices hereinafter set forth was given; in October, 1875, plaintiff called in the proper fence viewers,

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to view, divide said hedge, and assess the value of the half thereof given by them to defendant; defendant had legal notice thereof, and on the 25th day of October, 1875, said viewers met and made their report that said 'Miner shall have the east half of said line to keep a lawful fence upon, and said Bennett the west half for the same purpose; we also set a value on the fence now standing on the said Bennett's half, which we agree shall be forty dollars.' Immediately thereafter defendant had notice thereof, and plaintiff then demanded pay according to the terms of said award; said hedge on said day was not, never had been, and still is not a lawful fence, would not turn stock, but was of the value of forty dollars. Defendant inclosed his land in 1870; on the 12th day of October, 1875, and before the notice was served by plaintiff on defendant, the defendant served on plaintiff, at Prairie township, in said county, a notice in writing, in words and figures as follows, to-wit:

‘OCTOBER 12, 1875.

“D. W. MINER: I hereby notify you that I shall open a 20 foot lane on my land, next to and adjoining a line immediately south of the NE. $\frac{1}{4}$ of Sec. 1, Tp. 77, R. 13, west, six months from this date.

M. D. BENNETT.’

“On the 13th day of April, 1876, defendant did open a lane of said width on said line, making a fence 20 feet south of the line of plaintiff's land, and open on a public highway at the east end thereof, but closed by bars at the west end, where defendant also owned land.”

The question presented is purely one of law: whether under the above facts the defendant is legally bound to contribute to the maintenance of a fence between his premises and those of plaintiff. The provisions of the Code applicable to the question are as follows:

“Sec. 1496. When lands owned in severalty have been inclosed in common without a partition fence, and one of the owners is desirous to occupy his in severalty, and the other refuses or neglects to divide the line where the fence should be built or build a sufficient fence on his part of the line

Miner v. Bennett.

when divided, the party desiring it may have the same divided and assigned by the fence viewers, who may, in writing, assign a reasonable time, having regard for the season of the year, for making the fence, and if either party neglect to comply with the decision of the viewers the other after making his own part may make the other part, and recover as directed above.

“Sec. 1497. In the case mentioned in the preceding section, when one of the owners desires to throw open any portion of his field not less than twenty feet in width, and leave it uninclosed to be used in common by the public, he shall first give the other party six months notice thereof.

“Sec. 1498. When land which has lain uninclosed is inclosed, the owner thereof shall pay for one-half of each partition fence between his lands and the adjoining lands, the value to be ascertained by the fence viewers, and, if he neglect for thirty days after notice and demand to pay the same, the other party may recover as before provided; or he may at his election rebuild and make half of the fence, and if he neglect so to do for two months after making such election he shall be liable as above provided.

“Sec. 1499. When a division of fence between the owners of improved lands may have been made, either by fence viewers or by agreement in writing, recorded in the office of the clerk of the township where the lands are, the owners and their heirs and assigns shall be bound thereby, and shall support them accordingly, but if any desire to lay his lands in common, and not improve them adjoining the fence divided as above, the proceedings shall be as directed in the case where lands owned in severalty have been inclosed in common without a partition fence.”

Section 1497, it will be observed, refers to section 1496, and provides that in the case there mentioned a party may throw open any portion of his field not less than twenty feet in width, if he shall first give the other party six months notice thereof. The case mentioned in section 1496, to which section 1497 refers, is where lands owned in severalty have been inclosed in common without a partition fence. Section 1499

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refers to a case where a division of the fence between the respective owners of adjoining land has been made, and each has been assigned his respective portion to maintain. In such case any person desiring to lay his lands in common, and not improve them adjoining the fence so divided, may proceed as directed in section 1497, where lands owned in severalty have been inclosed in common without a partition fence. But the statute makes no provision for a case where one party has inclosed his land, and afterward another party incloses the adjoining land, and no division of the fence separating the adjoining owners has been made between the respective owners of the premises, unless, indeed, section 1499 should by construction be held to apply to, and, in its spirit, to embrace such a case.

This omission, however, may very reasonably be accounted for upon the theory that one who merely incloses his premises adjoining another close, and does not own any part of the division fence, may, at pleasure, and without the aid of statute, throw his inclosure open to common, since the owner of the adjoining close is then left in as good condition as he was before; whilst if the adjoining premises are inclosed in common, or the division fence is jointly owned by the adjoining proprietors, the owner of the other premises should have time to construct the whole or a part of the fence upon the dividing line. It cannot be supposed that the legislature intended to deny absolutely, to the person in the condition last named, the privilege of throwing open his inclosure to common, and at the same time to confer that privilege upon the owners of land in severalty inclosed in common, and upon the owners of land separated by a division fence respective portions of which are owned by the adjoining proprietors.

But, however that may be, let us consider whether the premises in question were, in fact, occupied in severalty. The evidence shows that the hedge on the line between the premises never had been, and is not, a lawful fence, and that it would not turn stock. It is not necessary that a fence between inclosures, in order to impress upon the premises the character of being occupied in severalty, should be a lawful

Miner v. Bennett.

fence. But there can be no such occupation unless each proprietor is able to keep his stock upon his own premises. If animals turned upon the premises of one may, at will, pass upon the premises of the other, it is apparent that there can be no such thing as occupancy in severalty.

A row of hedge-plants six inches in height upon the line between premises otherwise inclosed in common would indicate an intention at some time to occupy in severalty. But, whilst the plants remained in this condition, no one would think of saying that the premises were separated by a partition fence, and that each owner was occupying his part in severalty. Both time and care are requisite that these tender plants may attain the character, and be entitled to the name of a partition. When, then, is this character assumed? Not, it seems to us, until they become sufficient to turn stock. We know nothing of the character and condition of this fence, except that it would not turn stock, and the fence viewers assessed it at \$40, or fifty cents per rod. We think, inasmuch as this fence never attained sufficient perfection to prevent stock from passing from the premises of one owner to those of the other, that they could not have been occupying in severalty, but their lands were inclosed in common, without a partition fence, within the spirit of section 1496. It follows that, under section 1497, the defendant had a right, upon giving six months notice, to throw open a portion of his inclosure, not less than twenty feet in width.

The evidence shows that defendant gave notice of his intention to do this before the plaintiff served notice of the application to the fence viewers to divide and assess the value of the fence. Defendant, therefore, is not liable to contribute to the maintenance of a fence on the line between his premises and those of plaintiff

REVERSED.

Prime v. Eastwood.

PRIME v. EASTWOOD.

45	640
94	800
45	640
116	880
45	640
135	47
45	640
1132	293
45	640
136	200

1. **Slander: Interpretation of Words.** Words are to be construed in the sense in which, in the light of all the circumstances known to speaker and hearer, they are calculated to impress the hearer's mind and will be naturally understood.
2. ——: **Evidence: Quo Animo.** Evidence of other slanderous utterances than those charged in the petition is admissible for the purpose of showing malice.
3. ——: **Mental Distress: Aggravation of Damages.** Mental anxiety and distress of mind cannot be shown in aggravation of damages in an action for slander.
4. ——: **Repetition of Slanderous Words.** The repetition of slanderous words is wrongful, and damages which result therefrom are a consequence of that wrong and not a natural, immediate and legal effect of the original speaking by defendant.

Appeal from Story Circuit Court.

THURSDAY, APRIL 19.

THIS is an action for the recovery of damages for slanderous words alleged to have been spoken by defendant concerning plaintiff, charging plaintiff with stealing defendant's hogs. The first count of the answer contains a general denial to all the counts of the petition. The other counts of the answer admit that defendant had conversations similar to those alleged in the second and third counts of the petition, but allege that he spoke the words without malice, and without any intention of charging plaintiff with the commission of a crime.

There was a jury trial, and a verdict and judgment for plaintiff for \$400. The defendant appeals.

Rainbolt & Barnes, for appellant.

McCarthy, Stevens & Underwood, for appellee.

DAY, CH. J.—I. Upon the trial one P. L. Porter testified as follows: "About the first of November, 1875, defendant ^{1. SLANDER:} came to my house and said that he was out looking for some hogs that he had lost, and claimed interpretation

Prime v. Eastwood.

that his hogs were over at plaintiff's who would not give them up to him; that he had asked plaintiff for them, and plaintiff said they were his own hogs and he would not give them up. Defendant further said that he had cut off the ears and tails of them, to make them look like his hogs. I had another conversation four or five days afterward with defendant in regard to the matter. He said: 'Porter, I know you won't steal hogs, but I know George Prime will.' Says I: 'Mr. Eastwood, that is saying a good deal; you can't convince me any way you can fix it that George Prime would steal; he has his bad ways, same as you and me, but so far as his stealing, I don't think he would do that. I have lived alongside of him as long as you have, and I say he won't steal.' Defendant said: 'I have lived near him as long as you have, and I know that he will.'"

It is strongly urged by appellant that the words spoken to Porter are not actionable, and could not reasonably have been understood in an actionable sense. Appellant insists that, although the words themselves charged the plaintiff with the commission of a criminal offense, yet if they were understood in a different sense by Porter, and defendant intended that they should be so understood, defendant is not liable. Citing *McCaleb v. Smith*, 22 Iowa, 242; *Desmond v. Brown*, 33 Iowa, 13; 1 Hilliard on Torts, 3d ed., p. 258; Townshend on Slander, 2d ed., p. 214, note 3, p. 173, note 1, and p. 189. The position of appellant would be correct if there were any proof of circumstances known to Porter from which he understood that the words in the connection in which they were employed were not intended to impute a crime. Words are to be construed in the sense in which, in the light of all explanatory circumstances known to speaker and hearer, they are calculated to impress the hearer's mind and will naturally be understood. *Dixon v. Stewart*, 33 Iowa, 125, and authorities cited. The conversation in this case had reference to the plaintiff's having defendant's hogs in his possession, claiming them as his own, and having cut off their ears and tails to make them look like his own. Respecting this, defendant said: "Porter, I know you won't steal hogs, but I know George Prime

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will. I have lived near him as long as you have, and I know that he will." The natural import of these words is to charge the crime of larceny. There is nothing in the circumstances proved tending to show that Porter could reasonably have understood them in any different sense, or that he did in fact understand them in a different sense. Upon the contrary, the whole testimony of Porter shows that he understood the crime of larceny to be charged. The words, therefore, must be considered in their usual and ordinary acceptation.

II. The plaintiff introduced one Frank Gibson, who testified as follows: "I met defendant one day and passed the 2. — : evi- time of day with him, and he spoke something dence; quo about hogs; he said that plaintiff had stolen some animo. of his hogs, and he could prove it." This testimony was objected to for the reason that there is no allegation in the petition of a conversation with this witness. Such evidence is admissible for the purpose of showing malice. *Beardsley v. Bridgman*, 17 Iowa, 290; *Schrimper v. Heilman*, 24 Iowa, 505.

III. The plaintiff, against defendant's objection, was permitted to prove that, in consequence of the charge, he had 3. — : men- been troubled, and suffered mental anxiety. If tal distress : this testimony was at all admissible it must have aggravation of damages. been for the purpose of aggravating the damages. The action of slander is given for injuries affecting the reputation. In *Terwilliger v. Wands*, 17 N. Y., 54, it was held that special damages, to support an action for defamatory words not actionable in themselves, must result from injury to the plaintiff's reputation which affects the conduct of others toward him, and that his mental distress, physical illness and inability to labor, occasioned by the aspersion, are not such natural and legal consequences of the words spoken as to give an action.

In this case the court say: "It would be highly impolitic to hold all language wounding the feelings and affecting unfavorably the health and ability to labor of another a ground of action, for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are

Prime v. Eastwood.

easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him, and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of the ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature, and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. In this view of the law words which do not degrade the character do not injure it, and cannot occasion loss."

The same doctrine is announced in *Wilson v. Goit*, 17 N.Y., 442. It seems to us that these cases announce the proper doctrine. If mental anxiety and distress of mind do not constitute such special damages as will sustain an action of slander for words not actionable *per se*, it is because distress of mind and mental anxiety do not constitute such damage as can be redressed by an action for slander, and consequently they cannot enhance the damages when the words spoken are actionable *per se*. And this is the view declared in Townshend on Slander and Libel, section 391, in which it is said: "The plaintiff, to aggravate damages, cannot prove the defendant's wealth, nor that it was currently reported that defendant had charged the plaintiff with the crime mentioned in the declaration, nor that the plaintiff had suffered distress of mind." The case of *Swift v. Dickerman*, 31 Conn., 285, holds a contrary view; so also does *Dufort v. Abodie*, 23 La. Ann., 280.

IV. Against the objection of defendant the court permitted the plaintiff to prove that there was a rumor in the neighborhood in reference to plaintiff, and that defendant had claimed that plaintiff had some of his hogs. The court instructed the jury as follows: "In determining

^{4.} _____ ; repetition of slan-

derous words.

Prime v. Eastwood.

the amount of damages to be given to the plaintiff, if he is entitled to recover, you may consider the extent of the publication, as how far known and how understood and believed in the community where known, so as to determine the extent of the injury to his reputation." The words charged were spoken on different occasions to Porter, to Tilden, and to McCarthy, no one else being present. "Every speaker is the publisher of what he speaks, and is solely liable therefor. That the words spoken have been previously published by another can neither relieve the subsequent speaker from his liability for the publication made by him, nor impose any liability on the previous publisher." Townshend on Slander, sections 114, 202. See also *Terwilliger v. Wands*, 17 N. Y., 54 (58); *Ward v. Weeks*, 7 Bing., 211; *Stevens v. Hartwell*, 11 Metcalf, 542.

The true rule upon the subject, we think, is that recognized in *Terwilliger v. Wands*, *supra*, that where there is no proof of the circumstances under which slanderous words are repeated by the parties who originally heard them, the general rule that a repetition of slanderous words is wrongful applies, and damages which result from repeating them are a consequence of that wrong, and not a natural, immediate and legal effect of the original speaking by the defendant.

The effect of the action of the court in receiving this evidence and in giving the above instruction was to hold the defendant liable for the extent to which the publication was known, and consequently for the repetition of the publication by others, without reference to the circumstances under which the repetition was made. In this there was error.

REVERSED.

Smith v. Stephenson.

SMITH ET AL. V. STEPHENSON ET AL.

45	645
119	207

1. **Principal and Agent: AUTHORITY OF AGENT.** Authority given by a principal to an agent to invest his money, and look after his business generally, will not enable the agent to sell his principal's property, even such as may be acquired as the result of the investment.
2. **—: TAX PURCHASE.** Where one is buying at a tax sale for himself, and is also acting in some purchases as the agent of another, it will be presumed that the purchases made in his own name, and upon which he takes the certificates, are not made for his principal but for himself.
3. **Tax Sale: ASSIGNMENT.** Where a tax purchaser assigned his certificate to another, the assignment not being recorded, and after the expiration of three years from the time of sale, but before the execution of the deed, executed a quit claim deed to the owner of the property, *held* that the quit claim deed conveyed no title, and that the assignment of the certificate was valid.

Appeal from Adams Circuit Court.

THURSDAY, APRIL 19.

ACTION in equity to set aside a tax deed and quiet plaintiffs' title. The plaintiffs' land was sold at tax sale to the defendant, Stephenson. He assigned the tax certificates to the defendant Atkins, and Atkins executed a bond for a quit claim deed to the defendant Bixby. After the expiration of the three years from the time of sale, but before the execution of the tax deed, the defendant Stephenson executed a quit claim deed for the consideration of \$50 to the plaintiffs, and agreed to deliver to them the tax certificates. They claim that he was the owner of the tax certificates at the time, or if not that he was Atkins' agent with authority to sell or surrender them, and that the tax claim upon the property by reason of the said transaction became extinguished.

Other facts are stated in the opinion. Decree for defendants. Plaintiffs appeal.

Davis & Anderson, for appellants.

John Bixby & Son, for appellees.

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ADAMS, J.—The tax sale took place October 1st, 1866. The tax deed recites that the certificates were assigned by Stephenson to Atkins February 15th, 1867, and the tax certificates purport to show the assignment of that date. This was long before Stephenson's quit claim to plaintiffs, and if the assignment was really made on that day the plaintiffs took nothing by their transaction with Stephenson, unless Stephenson had authority to act for Atkins in the matter, and unless also his act was in such form as to bind Atkins. There is no evidence tending to show when the certificates were assigned other than that above set forth.

The assignment of course took place at the time of delivery. On this point there is no direct evidence whatever. The execution of the tax deed to Atkins would be presumptive evidence that the certificates had been delivered to him before that time, and a delivery being shown we think the presumption is that they were delivered at the date of the assignment. We must consider then that Atkins became the owner of the certificates on the 15th day of February, 1867. The transaction between plaintiffs and Stephenson took place August 2d, 1870. The appellants contend, it is true, that there is evidence tending to show that the certificates had not been assigned at that time.

They introduced Stephenson as a witness, who said: "As to sale of tax certificates I remember by reference to this deed (his deed to plaintiffs), that I sold the certificates to I. R. and Myron Smith, plaintiffs, through Mr. Cummins, of Quincy." But this cannot, we think, be construed as a statement that he owned them at that time. He undertook to sell them and did sell them so far as he could do so. We think he meant nothing more, because he says: "I don't remember whether I assigned the certificates of purchase to C. B. Atkins before or after the sale."

Taking it then as established that Atkins became the owner before the transaction between Stephenson and plaintiffs, we have to inquire whether Stephenson, as Atkins' agent, was authorized to make such transaction.

It appears from the evidence that Stephenson had been

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accustomed to invest money for Atkins in purchasing land at tax sale, and where the land was afterwards redeemed he had been accustomed to draw the redemption money. Whether the certificates in question belonged to Atkins from the beginning, as being certificates of sales in which he furnished the purchase money, or whether they belonged to Stephenson and were by him sold to Atkins, does not appear. Stephenson says: "The assignment to Atkins was a *bona fide* transaction and for a valuable consideration."

But this statement is consistent with either theory. As to the extent of Stephenson's agency, he says: "During the time

1. PRINCIPAL and agent: I was superintending the investment of tax money for Atkins my authority was general. He told me to look after his business and I did so." To our mind the record fails to show that Stephenson was authorized to release Atkins' interest in land, where the time of redemption had expired.

This involved the waiver of a right, or the sale of property. Authority given by a principal to his agent to invest his money, and look after his business generally, would not, we think, enable the agent to sell his principal's property, even such as might be acquired as the result of the investments.

But the evidence fails utterly to show that the certificates in question were issued upon sales in which Atkins furnished the purchase money. The purchases were made in Stephenson's name and the certificates issued to him. During this time Stephenson was buying at tax sales for himself as well as Atkins. The presumption must be that these certificates belonged originally to Stephenson and were by him sold to Atkins. If such was the fact, it seems entirely clear to us that it was not within the scope of Stephenson's agency to re-sell the certificates or release Atkins' interest in the land. If we are correct, we need not inquire whether his attempt to release or convey simply his own interest could have the effect to release or convey Atkins'.

The appellants claim that, as they had no notice of the assignment to Atkins, either actual or constructive, at the

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time they parted with their money in their transaction with ^{3. TAX SALE:} Stephenson, they ought to be protected. Our attention is called to section 888 of the Code, which provides that "in case the certificate is assigned, the assignment shall be placed on record in the treasurer's office in the register of sales." In this case no record was made of the assignment. But we think that none was necessary. The assignment was made before the Code, and no provision of law appears to have been made at that time for a record of the assignment. By section 778 of the Revision it is provided that "the certificate of purchase shall be assignable by indorsement, and an assignment thereof shall vest in the assignee or his legal representatives all the right, title and interest of the original purchaser."

The appellants, in support of their theory, cite *McCarver v. Nealey*, 1 G. Greene, 360. In that case it was held that a judgment debtor who had paid the judgment to the plaintiff's attorney of record should be protected in such payment, notwithstanding the judgment had been previously assigned, it not appearing that the judgment debtor had notice of the assignment. But this decision, to our mind, is not applicable to the case at bar. It would not be claimed that if the judgment creditor had sold and assigned the judgment, and afterwards, pretending still to be the owner of it, he had made another sale and assignment of it to a person, without notice, that such person would be protected. At the time of the transaction between plaintiffs and Stephenson they sustained in contemplation of law the same relation to the certificates that any other person would have sustained who should have purchased them and taken a quit claim deed of the land. Their right of redemption at that time had expired. Such being the case, we think they should have taken notice at their peril as to whether Stephenson was still the owner of the certificates.

After this suit was commenced Atkins executed a quit claim deed to plaintiffs. The appellants claim that at that time, if Atkins ever owned the land, he still owned it, and that he then elected to stand on the penalty of his bond to

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Bixby, so that, whether the assignment was made before or after the quit claim deed of Stephenson, the decree of the court below is erroneous.

The decree was substantially that Atkins' quit claim deed to plaintiffs be declared null and void. This was in accordance with the prayer of Bixby, and we think that he was entitled to have the deed so declared. According to the view we have taken of the case, Bixby was the equitable owner of the land at the time this suit was commenced, holding a title bond to the same. The plaintiffs knew that he so claimed, and made him defendant herein. Afterwards they obtained from his vendor the said quit claim deed. We think that they are entitled to no advantage thereby.

AFFIRMED.

SHARPLESS v. GREGG.

1. **Conveyance: ADMINISTRATOR.** Where a father conveyed to his sons, with covenants of warranty, certain realty upon which there were incumbrances, *held*, that after his death the incumbrances were debts of his estate and not of his grantees.

Appeal from Johnson Circuit Court.

THURSDAY, APRIL 19.

THE facts of this case briefly stated are as follows: C. H. Berryhill made two certain deeds of conveyance, each for the consideration of one dollar and love and affection, and with covenants of warranty, without exception, or reference to existing incumbrances. One of said deeds was made to his son Samuel L. Berryhill. The property conveyed was certain real estate situated in Iowa City. At the time of the conveyance, which was dated March 18, 1873, the premises conveyed were incumbered by a mortgage, dated Sept. 30, 1871, properly recorded, given by C. H. Berryhill, payable to one Clapp, to

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secure three promissory notes of \$500 each, payable Oct. 1, 1873, 1874 and 1875, respectively, with interest at ten per cent. Interest was paid on each note to Oct. 1, 1872. No further payments of principal or interest have been made.

C. H. Berryhill became insane in September, 1873, and afterwards died.

The other deed was made to his son James G. Berryhill, dated August 25, 1873, which conveyed certain real estate in Iowa City. At the time of said conveyance, the premises conveyed were subject to a mortgage to E. C. Lyon, given by said C. H. Berryhill on the 17th day of May, 1871, to secure a promissory note of \$3,000, of that date, payable in five years, with ten per cent semi-annual interest. Interest on said note was paid by C. H. Berryhill until he had become insane, and after that by his guardian and executors, to May 17, 1874.

After the decease of U. H. Berryhill, and within six months thereof, the said mortgage claims were filed as general claims against his estate.

The plaintiff, being administrator of the estate of C. H. Berryhill, presented his petition to the court below, setting forth the foregoing facts, and the further averment that he was about to make provision, by the sale of real estate, under the order of the court, for the payment of all just claims against the estate, and he prayed the decision of the court upon the question whether said mortgage claims should be paid by the administrator as other general claims, or whether said claimants should be remitted to their mortgage security.

There was an answer, or protest, of certain heirs of the estate, in which there is no denial of the facts above set forth, but they allege that the holders of the mortgages are not asking for payment from the general assets of the estate, but are pursuing the mortgaged property.

There was a hearing before the court, and an order was made that the administrator pay the mortgages in question from any money in his hands belonging to the estate.

The protestants, being heirs of C. H. Berryhill, appeal.

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Boal & Jackson, Fairall & Bonorden and Baker & Ball,
for appellants.

Clark & Haddock, for appellee.

ROTHROCK, J.—It will be observed that this is a contest between the heirs of decedent, and not between the grantees 1. CONVEY-
ANCE: admin-
istrator. in the deeds and the mortgagees of the property conveyed by the deeds. There is no doubt as to the right of the mortgagees to proceed against the mortgaged property, if they so elect. It appears from the bill of exceptions that they had, at the time of hearing in the court below, commenced actions for the foreclosure of the mortgages.

But this election or right of election, it seems to us, is an immaterial consideration in determining the question here presented. There is no claim made in the record that the estate is insolvent, and the only question to be determined is whether these mortgages are debts of the estate, or whether they are debts of the grantees in the deeds. That they are debts of the estate can admit of no doubt. That they are not the debts of the grantees of the deeds, containing as they do covenants against incumbrances, without exception, it seems to us is equally clear. We think the rights of the parties are to be controlled by the covenants in the deeds, and yet, if the intention of the decedent were an important consideration, what evidence is there of an intention that his children to whom he made these conveyances should pay these mortgages. The payment of interest up to the time he was stricken with insanity rather imports an intention to continue to pay his valid obligations in the form of promissory notes, for which no other person than himself was liable. See *Black v. Black*, 40 Iowa, 88.

AFFIRMED.

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45	658
82	175
82	255
45	658
86	144
45	659
86	22
86	304
45	652
94	85
45	652
96	614
97	349
45	652
112	370
45	658
119	354
119	357
119	477
45	652
120	215
4123	338
123	334

1. **Damages: NUISANCE: CONTINUANCE OF.** Whenever a nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character that will continue without change from any cause but human labor, then the damage is an original damage and may be at once fully compensated.
2. **— : — : SUCCESSIVE ACTIONS.** Successive actions are not allowed for damages resulting from negligence combining with a natural cause, however gradual the operation of the cause, and they will only lie where the defendant is continuously in fault.
3. **— : — : MUNICIPAL CORPORATION: STATUTE OF LIMITATION.** Where the defendant, a city, had constructed a ditch along a street by plaintiff's property in such a negligent and unskillful manner that his property was injured thereby, it was *held* that the damage resulting from the construction of the ditch was original damage, and that the right of action was barred in five years from the time when the injury to the property began.
4. **Practice: WHEN COURT MAY DIRECT VERDICT.** The court cannot take a case from the jury if there is any conflict in the evidence, and only has the power to do so when a party offers no evidence, or all the proof on both sides points in the same direction.

Appeal from Cass Circuit Court.

THURSDAY, APRIL 19.

THE plaintiff is the owner of certain lots in the city of Council Bluffs, abutting on Green street, and has been since a time prior to the occurrence of the injury complained of. In 1859 the said lots were crossed by a meandering stream known as Indian Creek, which stream also flowed into Green street, and without crossing the street flowed nearly lengthwise of it for quite a distance, leaving about twenty feet in width of the street for travel in the narrowest place. In order to remove the stream from the street the city determined to cut a ditch along the side of the street and across the end of the plaintiff's lots where they abutted on the street. For this purpose the city obtained from the plaintiff a relinquishment of a right-of-way. The ditch was cut, and the

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stream was turned into it and was thereby much shortened and removed both from the street and the plaintiff's premises. This was done during the years 1859 and 1860. The ditch was extended to a county ditch, but was not cut as deep as the county ditch by about three feet. When the water of the Indian Creek ditch, therefore, flowed into the county ditch, there was a fall of about three feet. In not sinking the bottom of the Indian Creek ditch as low as the bottom of the county ditch the city committed a fault, for the soil was destitute of rock and sure to be cut away by the action of water. The fall at the county ditch made a cavity, and not only that, but cut backwards, up stream, or, to use the language of one of the witnesses, it *crawfished*. The cavity became wider as it extended up stream. It reached the plaintiff's lots about 1866, when he began to sustain damage from the action of the water. Prior to the commencement of this suit the ditch along the plaintiff's lots had become fifty feet wide and twelve feet deep. To confine the water within its proper channel and arrest its action in cutting and removing the soil, he has put in a wall, which has been successful.

This suit was brought by plaintiff to recover from the city the damage which he sustained. The city, among other things, pleaded the statute of limitations. There being no controversy as to the facts so far as the statute of limitations had any application, the court directed the jury to return a verdict for the defendant. The plaintiff appeals.

Sapp & Lyman and *Clinton, Hart & Brewer*, for appellant.

E. E. Aylesworth and *Montgomery & Scott*, for appellee.

ADAMS, J.—No suit could have been maintained until some actual injury was caused to the plaintiff by the action of the water, resulting from the improper construction of the ditch. Washburn on Easements and Servitudes, 591. But in 1866, if not earlier, the plaintiff's premises began to be injured, and he then, of course, had a right of action. The only ques-

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tion in this case is as to the character of the damage. Was it as it accrued from day to day new damage? If so, the plaintiff was entitled under the evidence to recover some damages, although his right of action as to a part of the damages which he had sustained might be barred. We have to distinguish, then, between what must be regarded as original damages and what may be regarded as new damages.

In 3 Black. Com., 220, it is said that every continuance of a nuisance is held to be a fresh one, and that, therefore, a fresh 1. DAMAGES: action will lie. In *Staples v. Spring et al.*, 10 ^{nuisance:} Mass., 72, action was brought to recover for damages which, it was alleged, the plaintiff had sustained by reason of his land being overflowed by defendants' mill-dam. It was held that, while plaintiff was barred from recovering for damage caused by the erection of the dam, he might recover for damage caused by its continuance.

In *McConnell v. Kibbe*, 29 Ill., 483, the same doctrine is recognized. The defendant owned the lower story of a building, the plaintiff the upper stories. The defendant removed in his story a partition brick wall, whereby the plaintiff's part of the building was injured. WALKER, J., said: "The continuance of that which was originally a nuisance is regarded as a new nuisance."

As, however, the suit was brought for the creation of the nuisance and not its continuance, it was held that plaintiff could not recover, the cause of action for the creation of the nuisance having become barred.

In *Bowyer v. Cook*, 4 Manning, Granger and Scott, 236, the plaintiff, having previously recovered against the defendant for placing stumps and stakes on his land in a ditch, brought suit for continuing them in the ditch. It was held that he could recover.

In *Holmes v. Wilson et al.*, 10 Adolphus and Ellis 503, the defendants, as trustees of a turnpike road, had built buttresses to support it on the plaintiff's land. Although the plaintiff had already recovered for the creation of the nuisance, it was held that he might recover for its continuance.

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The dividing line between the cases above cited and those in which the damages are considered as having all accrued at once as a part of the original injury is not always clearly distinguishable.

In the *Town of Troy v. Cheshire Railroad Co.*, 3 Foster (N. H.), 83, the defendant had built its road partly over the highway. While it was held that plaintiff could recover only for the damages which had been sustained at the time of the commencement of the suit, yet it was considered that all the damages which plaintiff had sustained, or could sustain, accrued when the defendant's road was built, and that only one recovery could be had. This case is similar to the one last above cited, but distinguishable from it. The difference, however, consists in the fact that the railroad bed was deemed a permanent structure, in such sense that it was not to be presumed that the company would remove it. The turnpike buttresses were not of such character. So, too, in the case where the defendant had placed stumps and stakes in plaintiff's ditch, the obstruction was not permanent.

In the *Town of Troy v. Cheshire Railroad Co.*, above cited, BELL, J., said: "Wherever the nuisance is of such character that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change from any cause but human labor, there the damage is an original damage and may be at once fully compensated."

The principle thus stated is sufficient to enable us to thread our way through any apparent difficulties which surrounded our path. In the light of it we can see that in a case of overflow from a mill-dam the injured party should be allowed to maintain successive suits. Somewhat depends on the way the dam is used. The injury, therefore, is not uniform. But, what is of controlling importance, the dam if not maintained will go down, as surely as the sun will go down, and the nuisance of itself will come to an end. Its duration will be determined by freshets and other forces which are contingent and, therefore, incalculable. It may, indeed, be so built that it should be regarded as permanent. In such case it is said that

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the damage should be considered and treated as original. *The Town of Troy v. Cheshire R. Co.*, above cited.

While no infallible test can be applied to enable us to determine whether a structure is permanent or not, inasmuch as nothing is absolutely permanent, yet, when a structure is practically determined to be a permanent one, its permanency, if it is a nuisance and will necessarily result in damages, will make the damages original.

If we apply the principle above stated to the case at bar we must hold that the damages were original. The plaintiff's ground of complaint is that the ditch was improperly constructed. As constructed it resulted in the excavation of the plaintiff's lots. The damage consisted, not in excavating the lots, but in doing an act which resulted in their excavation.

The result too was a necessary one, the ditch remaining as constructed. The cause of the difficulty was a permanent one in that it would not grow less unless remedied by human labor. The case, therefore, is strictly within the rule applied in the *Town of Troy v. Cheshire Railroad Co.*, above cited. Nor does the rule afford any difficulty in the assessment of damages, which is another test for determining the question under consideration, or rather the consideration of the difficulty of assessing damages is another way of applying substantially the same test. If the cause of the injury is permanent the damages can be foreseen and estimated. If the cause of the injury is not permanent, if it depends upon human volition as the maintenance of a mill-dam, the damages cannot be foreseen and estimated. Where the buttresses were placed on the plaintiff's land, in *Holmes v. Wilson et al.*, above cited, the damages could not be foreseen and estimated. The defendants were trespassers, and, the structure not being necessarily permanent, it was not to be presumed that the defendants would continue the trespass. The presumption was that it would be discontinued. But there being no presumption as to the time when it would be discontinued the damages could not be foreseen and estimated.

The same principle lies at the foundation of the dictum in *McConnell v. Kibbe*, above cited, where the defendant owned

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the lower story and the plaintiff the upper stories of a house, and the defendant removed a partition brick wall which was necessary for support. It could not be presumed that the defendant would allow the superincumbent stories to fall. It was to be presumed, therefore, that he would arrest the difficulty. With such a presumption the damages could not be foreseen and estimated.

When the fall in the stream in question had moved back from the county ditch to the plaintiff's lots and the creek ditch began to deepen and widen along those lots as it had been doing for six years on the land below, no especial foresight, we apprehend, was needed to predict the result. At all events it must be assumed that that may be foreseen which results from the ordinary and constant forces of nature.

The plaintiff's damage was susceptible of immediate estimation. No lapse of time was necessary to develop it. It was the difference between the value of his lots as they would have been if the ditch had been properly constructed, and the value of them as they were, with the ditch as it was. To reach this value, regard might be had to the reasonable cost of the remedy for the trouble, if the cost would not be greater than the probable damage which would ensue if no remedy were applied. The remedy, whether a wall or something else, it was the plaintiff's privilege to apply. The city could not do it better than he, and if the proper remedy was the erection of a wall on the plaintiff's premises, as the evidence tends to show, it was not the province of the city to apply it.

The case does not differ, so far as the principles in question are concerned, from any case where an injury has been received by one person from another's culpable negligence or unskillfulness. Its peculiar feature consists in the fact that the negligence complained of was injurious only through the gradual operation of an element of nature. But that element, the water, was a permanent and calculable force. If a mechanic constructs a building so unskillfully that it gradually falls down, no one would claim that the owner could have successive actions for damages during the fall. While the force and effects of the water in the case at bar could not,

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perhaps, be quite as definitely predicted as the force and effects of gravitation in the case supposed, the difference, if any, is one of degree and not of kind.

We have seen no case where successive actions have been allowed for damages resulting from negligence combining with 2. —: —: a natural cause, however gradual the operation of successive actions. Successive actions are allowed only where the defendant is continuously in fault. It may be a fault of commission or omission, but if the latter it must be something else than an omission to repair or arrest an injury resulting from negligence or unskillfulness, unless the remedy is to be applied upon the wrong-doer's premises.

The appellant, it is true, contends that the fault of the city did not consist simply in negligence or unskillfulness; that the construction of the ditch was unauthorized. Such, we think, however, is not the fair import of the record. The relinquishment of the right of way executed by plaintiff and others is in these words:

“We the undersigned owners of property fronting on Green street, south side, hereby relinquish a right of way for Indian creek ditch.

“*Council Bluffs, July 20, 1860.*”

It is claimed that a right of way was by the foregoing relinquishment in Green street, and not outside of it. But in our opinion that is not the meaning of the instrument. Besides, if Green street was an established street, there was no occasion for the relinquishment of a right of way in it. If it was not an established street, then the city had no right to dig the ditch for its improvement, or for any other purpose which we can see, and what was done was *ultra vires*, and the case has no foundation.

The only fault, then, of the city was its negligence or unskillfulness in the construction of the ditch, and the damages resulting therefrom must all be regarded as original damages.

It follows that the plaintiff's cause of action accrued more

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than five years prior to the commencement of the suit, and is barred by the statute of limitations.

AFFIRMED.

ON REHEARING.

BECK, J.—Upon the announcement of the decision of this case in the foregoing opinion, plaintiff presented his petition asking for a rehearing, which was granted, and the cause was again submitted to us upon new arguments on behalf of both parties. We have given the questions, both of law and fact, upon which our conclusions presented in the foregoing opinion are based, such careful and patient consideration as their importance and the importance of the case demands. We have been able to reach no other conclusions than those stated in our first opinion. The positions of plaintiff, presented in the petition for rehearing, and his argument thereon demand brief consideration.

The pivotal legal principle announced in the foregoing opinion we do not understand counsel for plaintiff to controvert. Certainly, we are of the opinion, it cannot be successfully controverted. Counsel, however, deny its applicability to this case. This principle is announced in the opinion in the following language, quoted from an authority referred to: "Whenever the nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character that will continue without change from any cause but human labor, there the damage is an original damage and may be at once fully compensated."

After the ditch was constructed and the water of the creek first began to work upon plaintiff's land, its continuance was just as certain as that water would flow in the creek unless changes were made therein by human hands. Its continuance would just as certainly be an injury as that the floods of the creek would wash the soil and earth through which the ditch was dug. It follows that plaintiff's cause of action then accrued for all injury sustained, or that in the future would be suffered. The very cause of action for which this suit was brought then existed.

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Counsel for plaintiff insist that the application of the statute of limitations to the case involved certain questions of fact upon which plaintiff had the right to have the verdict of the jury, and that the court, therefore, erred in taking the case from the jury and directing a verdict for defendant. These questions relate to: 1. The permanence of the ditch; 2. Continuance of the injury; 3. The date of the beginning of the injury. That these questions were involved in the determination of the case cannot be denied, and that the court in determining each favorable to the defendant correctly decided we do not doubt. No other conclusion could have been reached than that the ditch would have continued, unless changed by human hands, as long as the creek exists, and that it would continue to wash away the lots of plaintiff. This conclusion is established without conflict in the evidence, and is consistent with and required by the very nature of the soil, the character of the creek and other things connected with the case.

The same is true in regard to the other question of fact, namely, the date of the beginning of the injury. The evidence shows beyond dispute that the first injury was sustained by plaintiff in 1866. He so testifies; other witnesses so testify; no witness gives evidence contradictory thereto, and counsel for plaintiff in their first argument in this court admit it. The period of the limitation of this action, beginning in 1866, expired before the suit was commenced. Under this state of facts the action of the court in directing a verdict for defendant was correct.

It is true that the court is required to submit a case to the jury, or rather cannot take a case from the jury, if there be any conflict in the evidence; the parties have a right to submit their case to the jury upon whatever evidence they offer, be it ever so inconsiderable. But not so if a party offer no evidence, or all the proof on both sides points in the same direction.

We are well satisfied with the conclusions reached in the foregoing opinion, and adhere to the decision therein announced.

Murphy v. The C., R. I. & P. R. Co.

MURPHY v. THE C., R. I. & P. R. CO.

45	661
81	456
45	661
88	256
45	661
84	697
45	661
96	704

1. **Negligence: BURDEN OF PROOF: RAILROAD.** In an action by an administrator against a railroad company for causing the death of a person, the plaintiff must prove that the decedent was not guilty of negligence contributing to his death.
2. _____: _____. The proof of the fact that decedent, at the time of the accident, was in the exercise of ordinary care, need not always be direct and positive, but the fact may sometimes be fairly and reasonably inferred from the circumstances.
3. **Practice: COURT MAY DIRECT VERDICT.** Whenever any of the essential and integral elements of a cause of action are wholly without proof, the court may properly refuse to allow the case to go to the jury.

Appeal from Polk Circuit Court.

THURSDAY, APRIL 19.

THIS is an action to recover damages for the death of John Murphy, alleged to have been caused by the negligence of the defendant's employes. The defendant denies the negligence on its part, and alleges that the injury complained of was contributed to and caused by the carelessness and negligence of the deceased.

When the plaintiff had produced his testimony and rested his case, the defendant moved the court to direct the jury to find for the defendant, for the reasons, amongst others, that there is no evidence showing, or tending to show, that at the time of the accident plaintiff's intestate was exercising ordinary care and prudence to avoid injury; and the undisputed evidence shows plaintiff's intestate to have been guilty of such negligence as contributed proximately to the accident, and without which it would not have occurred. This motion was sustained, and under the direction of the court the jury returned a verdict for the defendant. This case was before us on a former appeal. See 38 Iowa, 539. Plaintiff appeals.

Seward Smith and John Gibbons, for appellant.

Wright, Gatch & Wright, for appellee.

Murphy v. The C., R. I. & P. R. Co.

DAY, J.—The testimony, in connection with the plat, introduced by plaintiff, establishes substantially the following facts:

John Murphy, plaintiff's intestate, at the time of his death, and ever since defendant's road was built through Des Moines, where the accident occurred, resided at the corner of Market and Tenth streets, within a few feet of the defendant's road, which runs in a direction almost east and west across the rear end of the lot on which the deceased resided. From the deceased's residence to the depot, three blocks west, the road is entirely straight, with a down grade most of the way of thirty-two feet per mile. Opposite deceased's house the road descends to the east, so that his house stands at the summit. Immediately east of the depot, and between that and the house of deceased, the main track had been used ever since the road was built for the purpose of switching cars upon the different tracks of the depot grounds. The manner of doing this was to back the cars east up the grade by means of an engine, and then uncoupling them, and permitting them after the engine had returned to descend the grade, and placing them by means of the respective switches upon the desired track. Sometimes the cars were allowed to remain standing at the summit five or ten minutes before permitting them to descend. About three or four blocks east of the summit there was a coal switch and side track, to which the company was also accustomed to back its cars, switch them off, and bring the engine back alone. When cars were taken up for the purpose of being dropped down upon the side-track they were taken only to the summit.

Murphy, his family, the people of the neighborhood and the public generally, had used the track of the defendant's road as a common footway ever since the road was built, with the knowledge of and without objection by the company. Across the ditch on the south side of the embankment there was a plank crossing made by Murphy. Part of the way from Murphy's house to where the accident occurred the embankment was so narrow that it was impossible or difficult to walk on it without getting between the rails or upon the ends of the ties, and this was its condition at the point where the

Murphy v. The C. R. I. & P. R. Co.

accident occurred and for a short distance east. On the afternoon of June 6th, 1871, Murphy, in company with one Ragan, who is the principal witness for plaintiff, and the only one who details the facts connected with the accident, came from Murphy's house, went up the embankment upon the track and walked west between the rails a distance of about one hundred feet, when they met an engine backing a car eastward up the grade. They both stepped off upon the north side of the track until the engine and car had passed, when they again stepped upon the track and continued walking between the rails. When they had thus walked, as shown by the plat, a distance of ten hundred and seventy-four feet, the engine returned down the grade behind them, alone. Both again got off the track, Ragan on the north side, and Murphy upon the south side. Ragan continued to walk on the north side, outside the track and ties. Murphy walked some distance on the outside of the track, and then came nearer and walked on the ends of the ties a distance of three or four ties, and was just in the act of stepping sidewise upon the track, with his face to the west, when the car, returning down the grade, struck him from behind, rolled him down the embankment, and inflicted an injury of which he died in a few hours. Some one from the top of the car called "look out," and almost at the same instant the car struck him. After the car passed Ragan picked Murphy up and asked him if he was hurt, to which he replied, "I guess not;" but when he straightened up he said he was hurt pretty badly and that he "was always afraid of that part of the road ever since it was built, and at last he got caught right there." An ordinance of the city prohibits cars from moving faster than six miles an hour, and the car which did the injury was moving seven or eight miles an hour. Upon these facts the court directed the jury to find for the defendant.

It is now the well established doctrine in this State that, in an action upon the part of an administrator for causing the

1. NEGLIGENCE: burden of proof: death of a person, the plaintiff must prove that the decedent was not guilty of negligence contributing to his death. *Patterson v. The B. & M.*

Murphy v. The C., R. I. & P. R. Co.

R. R. Co., 39 Iowa, 279; *Donaldson v. The M. & M. R. R. Co.*, 18 Id., 280; *Greenleaf v. The Ill. Cent. R. R. Co.*, 29 Id., 14; *Muldowney v. The Ill. Cent. R. R. Co.*, 32 Id., 176.

It is true, this proof need not always be direct and positive. The fact of the exercise of ordinary care may sometimes be a ~~2. —: —:~~ fair and reasonable inference from the circumstances. But in this case there is no proof from which it can be inferred that deceased at the time he received his injury was in the exercise of ordinary care.

The facts proved do not admit of such an inference, but tend directly to establish the opposite conclusion.

The deceased for years had resided near the defendant's railroad track, and he was fully acquainted with the defendant's manner of doing business. He was fully aware of the dangerous nature of the place where he sustained the injury. Yet, notwithstanding all this, he was in the very act of stepping sidewise upon the track, in front of a moving train, without looking for its approach, when he received the injury which resulted in his death. Not only does the evidence fail to show that he was in the exercise of ordinary care, but, on the contrary, it appears affirmatively from the testimony that his death was the result of gross and culpable negligence.

If there is any testimony upon the essential questions of fact involved in a case, it is the duty of the court to submit the case to the jury.

But, whenever essential or integral elements of a cause of action are wholly without proof, the court may properly refuse

^{3. PRACTICE:} ~~court may direct ver-~~ to allow the case to go to the jury. *Allen v. Pegram*, 16 Iowa, 164; *Muldowney v. The Ill. Cent. R. R. Co.*, 32 Id., 176; *Way v. The Illinois Central R. R. Co.*, 35 Id., 585. See, also, *Allyn v. Boston & Albany R. R. Co.*, 105 Mass., 77; *Pennsylvania R. R. v. Beule*, 73 Pa. St., 504.

Appellant's counsel cite and rely upon section 7, chapter 169, laws 1862, and claim that under this statute all that the plaintiff is required to do is to show the defendant's neglect, and the consequent damage, and then his case is made out and he may demand a verdict.

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This statute is as follows: "Every railroad company shall be liable for all damages sustained by any person, including employes of the company, in consequence of any neglect of the agents or by any mismanagement of the engineers or other employes of the corporation to any person sustaining such damage."

This statute indicates no purpose to exonerate the injured party from the necessity of exercising reasonable care, in order that he may recover. Its evident purpose is to extend the liability of railroads to injuries to employes, for which at common law they were not liable.

The court, in our opinion, did not err in directing a verdict for the defendant.

AFFIRMED.

BECK, J., dissenting.—I cannot concur in the conclusions of the foregoing opinion affirming the judgment of the Circuit Court, and need state but one ground of my dissent.

The plaintiff is entitled to recover, notwithstanding the negligence of deceased, if the defendant became aware of the danger of deceased, and failed to use ordinary care to avoid injuring him. Shearman & Redfield on Negligence, §§ 25–26, 33; Sanders on Negligence, pp. 55–6. The rule is demanded by humanity as well as sound reason. In my opinion the record shows such facts that the court ought to have submitted to the jury the question whether under this rule the plaintiff was excepted from the effect of the doctrine of contributory negligence, and could have recovered, notwithstanding the deceased did not exercise care. There was evidence which, in my opinion, tended to show that defendant's servants knew of the want of care of deceased, and failed to use ordinary care to avoid injuring him. The jury should have been permitted to pass upon this evidence. It is not necessary for me to consider other points in the case as, for the reason assigned, I think the judgment of the Circuit Court is erroneous.

ON REHEARING.

SEEVERS, J.—Upon a careful examination upon rehearing,

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we are satisfied that the decision made by this court is correct, and that the foregoing opinion should be adhered to.

BECK and ADAMS, JJ., *dissenting.*

WORMLEY v. THE DISTRICT TOWNSHIP OF CARROLL.

1. **Practice: CHANGE OF VENUE: PLEADING.** A change of venue, pending the filing of an answer, takes from the plaintiff the right to file a motion for default, after the time to plead has expired, in the court where the action was commenced.
2. **Evidence: BOOK OF ACCOUNT: LIMIT OF INDEBTEDNESS.** The books of the secretary of a school district, showing the amount of its indebtedness, are admissible in an action against the district upon its orders, wherein it is pleaded that they were issued in excess of the legal limit of indebtedness.
3. ——: **FRAUDULENT AGREEMENT: CONSIDERATION.** The defendant having alleged that the indebtedness which was the cause of action was incurred by reason of a fraudulent agreement between plaintiff and its own agents, it was competent for plaintiff to show that the indebtedness was sustained by a valid consideration.
4. **TAXATION: EVIDENCE: LIMIT OF INDEBTEDNESS.** In an action upon the orders of a school district, defendant alleged that they were issued in excess of the constitutional limit of indebtedness; plaintiff offered to prove the value of certain lands upon the tax list, upon which the taxes were paid, but to which no valuation was assigned: *Held* that the evidence should have been admitted.
5. **Practice in the Supreme Court: EVIDENCE: JUDGMENT.** The Supreme Court will not inquire whether or not the judgment is sustained by the evidence, unless it shall appear either by the certificate of the trial judge or the agreement of the parties that all the evidence in the case is presented on appeal.

Appeal from Greene Circuit Court.

THURSDAY, APRIL 19.

ACTION on two orders drawn by the defendant on its treasurer, payable with ten per cent interest to Crocket Rebble, or

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bearer, for building school house. The orders were in the usual form and dated August 21st, 1868.

The answer set up several defenses, and among others that the defendant was indebted, at the time the indebtedness was created, to an amount exceeding the constitutional limit. There was a trial to the court, finding and judgment for the defendant, and plaintiff appeals.

G. R. Struble and C. L. Bailey, for appellant.

G. W. Payne and J. J. Russell, for appellee.

SEEVERS, J.—I. This action was commenced in December, 1873, in the Circuit Court of Carroll county. On January

^{1. PRACTICE:} 19th, 1874, the defendant appeared and was given change of venue: plead- until the next morning to plead, and on January 20th, 1874,

the cause was continued with leave to the defendant to plead before the first day of the next term. On August 20th, 1874, the place of trial was changed on motion of the plaintiff to the Greene county Circuit Court. On September 8th, in vacation of such court, the plaintiff filed a motion for a default, which motion, on the 15th day of September, being the first day of the next ensuing term of the Greene Circuit Court after the change of the place of trial, was overruled, and defendant filed its answer. When the place of trial was changed the Carroll Circuit Court had no jurisdiction or power to entertain a motion for a default, and the defendant could not anticipate that a default would be applied for until the first day of the Greene Circuit Court. There was no error in overruling the motion for a default.

II. It is made the duty of the defendant's secretary to keep a register of all orders drawn on the district treasurer, showing the number of order, date, name of the person in whose favor drawn, the fund on which drawn, for what purpose, and the amount. Code, section 1741; chapter 172, section 37, Laws of the Ninth General Assembly.

The defendant offered this book in evidence as tending to

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show the amount the defendant was indebted, and plaintiff's objection thereto was overruled.

There was no error in this ruling; the book was clearly admissible. 1 Greenleaf Ev., Sec. 491.

III. One of the issues tendered in the answer was that one of the orders sued on was issued in part payment for a school house erected by Crocket Rebble, and that the contract price of said house was about \$10,000, while the house in fact was not worth more than \$3,500, which was well known to the said Rebble and defendant's officers; that in pursuance of a fraudulent and corrupt agreement between said officers and Rebble, orders to the amount of about forty thousand dollars were issued in payment of said school house.

The defendant gave evidence tending to show the truth of the allegations in the answer and rested, whereupon the plaintiff offered to prove by said Rebble the value of said building when erected, what it cost and the value of the various materials of which the same was built. This evidence was rejected by the court, as we think erroneously. The tendency of the evidence was to disprove the fraudulent agreement and combination alleged in the answer.

IV. The defendant introduced in evidence the "tax list of Carroll county, which showed an assessment of real estate of \$124,744, not including about one-half of the lands in the county which were on the tax list and assessed to the Cedar Rapids and Missouri R. R. Co."

The foregoing statement leaves it in doubt whether the tax list included other property than that within the defendants' territory, but this doubt is removed by the admissions of counsel in their respective arguments. It is conceded that the taxable property of the defendant, as shown by the tax lists, amounted to \$124,744.

The railroad lands were listed and were contained in the said tax list, but no valuation was placed thereon; the taxes, however, were marked paid. The plaintiff sought to prove the "value of the lands so assessed, and no valuation carried

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out." The court sustained an objection to said testimony because it was immaterial and incompetent.

The constitutional provision provides that the amount of the taxable property shall be "ascertained by the last state and county tax lists previous to the incurring of such indebtedness." The property was properly listed, but why no valuation was placed thereon we are not informed. But as the taxes were paid we think the value of this property should have been included in the amount of defendant's taxable property. The omission of the value only should not deprive a creditor of having such property estimated. The evidence offered tended to show such value, and we think, subject to defendant's right to show the rate per cent of the taxes and amount paid, and thus ascertaining the assessed value, the evidence was admissible.

V. There was no finding of facts by the court, nor motion for a new trial; the judgment of the court, however, was excepted to. There is no bill of exceptions embodying the testimony, nor is there any certificate or statement signed by the trial judge showing that all the evidence is before us. The abstract, however, states that all the evidence is contained therein, but it fails to show that the defendant agreed thereto. It is clear that the case was tried upon oral and written evidence, therefore the clerk could not certify that all the evidence is contained in the abstract. If, however, he could, we do not even have such a certificate.

Under these circumstances we are asked to review the decision of the court and determine whether or not the judgment is sustained by the evidence. This we cannot do because there is no certificate of the trial judge, or agreement of parties that the evidence is all before us. Code, Section 3170.

Great injustice might be done the court below if we were to hold otherwise; beside this, however, such is the plain meaning of the statute.

In view, however, of the fact there must be a re-trial, we deem it proper to say that one material question is, what

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was the indebtedness of the defendant at the time the contract was made, which we understand to have been in June, 1868. That is, how much was the defendant indebted over and above that incurred under the contract? Then, what was the assessed value of the taxable property the previous year? If the contract was to be paid in orders at forty cents on the dollar this should be proved for the reason that the indebtedness under the contract might be increased as the evidence turned out to be.

REVERSED.

45 670
698 10

45 670
123 586

TOWNSEND & KNAPP v. ISENBERGER ET AL.

1. **Landlord and Tenant:** LEASE: RENT. Where land is leased upon condition that a third of the crop shall be given to the owner in payment of rent, the owner acquires no title to the part of the crop reserved for rent until it is set apart for him by the tenant.
2. _____: CONVEYANCE. Rent reserved by lease and not accrued passes with a conveyance, and a purchaser of the land at judicial sale becomes entitled thereto.
3. _____: NOTICE. The fact that notice in an action of attachment against the realty was served by publication does not prevent the rent from passing with the land at judicial sale.
4. _____: APPRAISEMENT. Nor will the purchaser's title be affected by a failure to appraise the rent prior to the sale.

Appeal from Black Hawk Circuit Court.

THURSDAY, APRIL 19.

ACTION of replevin for certain wheat and oats in the possession of Isenberger, one of the defendants. The other defendant, Miller, intervened, and setting up a claim of property in the grain was made a party to the action. The cause was submitted to the court for trial without a jury, and the facts joined upon which the decision was had for plaintiffs were preserved of record. The defendants appeal. The facts of the case sufficiently appear in the opinion.

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Boies & Couch, for appellants.

J. J. Tolerton and *H. C. Hemenway*, for appellees.

BECK, J.—The titles set up by the respective parties contesting the ownership of the property in question, as shown by the special findings of facts made by the Circuit Court, are based respectively upon one or the other of the following group of facts:

1. One Goodhue, being then the owner of certain land, leased it to defendant, Isenberger, on the 9th day of August, 1872, for one year. The tenant, by the terms of the lease, was required, for the use of the land, to deliver to Goodhue one-third of the grain raised upon the premises. The lease was in writing. On the 8th day of March, 1873, before the crops were planted, Goodhue assigned the lease to plaintiffs. The grain in controversy is the one-third of the crops reserved for rent under the lease, and was deposited by the tenant in a granary in compliance with the terms of that instrument. Upon these facts plaintiffs claim to be the owners of the grain taken on the writ of replevin.

2. On the 2d day of December, 1872, the defendant, Miller, brought an action of attachment against Goodhue, and on the 11th day of the same month the land leased to Isenberger was levied upon by the writ issued in the case. The defendant was served with notice of the action by publication, and on the 30th day of May, 1873, judgment was entered against him. The land was sold on the 19th day of July, 1873, without redemption, and on the same day a sheriff's deed executed to the defendant, Miller, the purchaser at the sale. At the time of the appraisement and sale the wheat was growing upon the land. It was not appraised. The crops were not planted by the tenant until after the attachment and assignment of the lease.

We are required to determine, upon these facts, the ownership of the grain in controversy.

I. 1. The share of the crops reserved by the lease to the land owner is to be regarded as rent. *Blake v. Coats et al.*,

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3 G. Greene, 548; *Rees v. Baker*, 4 G. Greene, 461; *Merrit v. Fisher*, 19 Iowa, 354.

2. The owner of the land acquired no property in the part of the crop reserved for rent until it was set apart to him by ^{1. LANDLORD} the tenant; the ownership of the tenant continued ^{and tenant:} lease: rent. until that time. *Rees v. Baker, supra*; *Alwood v. Ruckman*, 21 Ill., 200; *Woodruff v. Adams*, 5 Blackford, 318.

3. The rent was not paid, then, until the third of the crop was set apart by the tenant for the landlord, and was not payable until this could be done.

4. Rent reserved by lease and not accrued passes by a conveyance of the land to the grantee. *Abercrombie v. Redpath*, 1 Iowa, 111; *Van Driel v. Rosierz*, 26 Iowa, 575.

5. A purchaser under an execution sale is entitled to the rent accruing or falling due, after the execution of the sheriff's deed. *Bank of Penn'a v. Wise*, 3 Watts, 394; *Martin v. Martin*, 7 Md., 368.

6. The facts found by the Circuit Court are to the effect that the rent was not due and payable—had not accrued, until after defendant Miller had acquired title to the land upon the sheriff's deed. Under the authorities above cited he became entitled to the rent afterward accruing.

The fact that service of the notice in the attachment action was by publication does not prevent the application of the rules just stated. Although the proceeding was notice. *in rem*, it divested Goodhue's title to the land, and vested it in Miller. The accruing rent pertained to the realty and was transferred with it. As the proceeding *in rem* transferred the title of the land from Goodhue to Miller, the right to the rent passed with it.

Nor does the fact that the rent was not appraised prior to the sheriff's sale affect defendant's title. The land was appraised and, as we have said, the rent pertained thereto. It was not directly the subject of sale upon the execution. The right thereto passed as an incident of the transfer of the land to the purchaser. It was not,

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therefore, necessary under the law to appraise it separately from the land. The value of the right, it will be presumed, was considered in determining the appraised value of the property.

It is our opinion that Miller acquired, by this purchase at the sheriff's sale, the right to the rent of the land, and that when the third of the crop was delivered according to the terms of the lease, in the granary of the tenant, the property in the grain vested in him.

REVERSED.

THE STATE v. HUNT.

1. **Criminal Law: LARCENY.** Where one sold a steer which had been placed in the pound, claiming the animal as his own, and showed upon the trial that he had owned one resembling it in appearance, but failed to prove that his animal had strayed away or that he had made inquiry for it, *held*, that his conduct was inconsistent with a claim of ownership in the property.
2. _____: _____: WHAT CONSTITUTES "TAKING." The sale of the animal to another and authorizing him to take it from the pound constituted such a "taking" as made the act his own.

Appeal from Buchanan District Court.

THURSDAY, APRIL 19.

DEFENDANT was indicted and convicted of the crime of grand larceny, and sentenced to confinement in the penitentiary for eighteen months. His case is brought to this court on appeal.

Lake & Harmon, for appellant.

M. E. Cutts, Attorney General, and J. B. Powers, District Attorney, for the State.

BECK, J.—The main objection to the conviction of defendant is based upon the ground that the evidence does not support the verdict of the jury. The property which defendant was charged with stealing was a steer.

*I. CRIMINAL
law: larceny.*

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It was impounded by the marshal of Independence, and advertised for sale, under a city ordinance. At the day of sale, defendant, who was employed as auctioneer to sell the animal and another in the pound, claimed the steer and sold it to a butcher, by whom it was killed. The owner of the steer, after it was butchered, identified it by the hide and certain marks. There can be no doubt that it was his property; in fact, this is not denied. Defendant, upon the owner making claim to the property, paid him the sum he had received from the butcher. It is insisted that the evidence fails to show a felonious intent on the part of defendant, but establishes the fact that the property was sold by defendant under the honest claim and belief that it was his own. It is true that defendant, after he had seen the steer in the pound, did state that it was his property, and that it had strayed from his possession. But accompanying this claim was an inquiry addressed to the marshal as to the consequences that would result if it proved to be the property of another. He was informed that he would be required to pay the owner the value of the animal.

One witness testified that defendant, sometime previous to the transaction just referred to, owned or had in his possession a steer of the color of the one in question. But defendant offered no evidence to show that this steer had strayed away from him, that he had ever made inquiry for an animal of that description, or had claimed that he had lost an animal of the kind until he saw the steer in question in the pound. In fact, there is no evidence of his good faith in claiming the property, or that he entertained a belief of his right thereto. While expressing uncertainty as to his property in the animal he sold it to the butcher the very day he first saw it in the pound for a price less than its true value. All of these circumstances are inconsistent with truth and honesty in his claim of property in the animal.

II. It is argued that there was no evidence of the taking of the animal—that if it be conceded the property was not defendant's and was not sold in the belief of his ownership, the facts show simply a sale of property by defendant which he did not own, and not

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a larceny. But defendant asserted his ownership and claimed the possession by the sale. And further, he authorized the butcher to take the steer from the pound. This was a sufficient "taking," and as it was done under defendant's authority it must be regarded as his act.

AFFIRMED.

ON REHEARING.

ROTHROCK, J.—After filing the foregoing opinion a petition for rehearing was presented, upon which the case has again been submitted. We have again carefully examined the record in connection with the petition for rehearing, and are confirmed in the belief that the verdict finds sufficient support in the evidence. Certain newly discovered evidence accompanies the petition for rehearing, which, if it were proper to consider, might and probably would lead us to a different conclusion. But there is no authority for the introduction of newly discovered evidence upon appeals to this court. The judgment of the District Court must stand affirmed.

ADAMS, J., dissenting.

MEARS & HAYS v. STUBBS & CO. ET AL.

1. **Mechanic's Lien: sub-contractor: agency.** Before the statement of his lien by a sub-contractor can be given to the owner to establish his lien, either the contractor himself or his duly authorized agent must have refused to sign a statement of his claim.

Appeal from Marion Circuit Court.

FRIDAY, APRIL 20.

ACTION to recover for labor performed in the construction of a railroad and to establish a lien upon the railroad. The plaintiffs were sub-contractors under Stubbs & Co., who were

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themselves sub-contractors under the defendant, Samuel Merrill, who had contracted to build the road for the defendant, the Knoxville, Albia & Des Moines R. R. Co. As to the amount due there is no controversy. The only question is as to whether the plaintiffs are entitled to a lien upon the road. The facts are stated in the opinion. Decree for plaintiffs establishing their lien as prayed. Defendants appeal.

Stone & Ayres, for appellants.

E. R. & L. N. Hays, for appellees.

ADAMS, J.—The statute does not expressly provide for a lien in favor of a person who is a sub-contractor under a sub-^{1. MECHANIC's} contractor; but that such person may nevertheless have a lien was held in *Utter v. Crane*, 37 Iowa, 631. We have only to consider, then, whether the plaintiffs have taken the proper steps to entitle themselves to a lien. By sections 2131 and 2134 of the Code it appears that the sub-contractor in order to entitle himself to a lien must obtain a settlement with and a written statement thereof from his contractor, which shall be given to the owner, unless his contractor shall refuse to make and sign such settlement, in which case he may make a statement himself, and give that to the owner. In this case no written statement of settlement was signed by the plaintiffs' contractors, but the plaintiffs made the statement themselves. This, as we have seen, would be sufficient, provided the contractors refused to make and sign it. On this point one of the plaintiffs in his testimony said: "We had a settlement with Stubbs & Jackson. The settlement was presented to Mr. Mellen and he refused to sign it." Whether the refusal of Mellen could be considered the refusal of the contractors, Stubbs & Co., or, as the witness calls them, Stubbs & Jackson, depends of course upon what Mellen's authority was. If he had authority from the contractors to sign a statement of settlement, then his refusal would be their refusal. We have then to inquire as to what Mellen's authority was. The evidence shows that Mellen was Stubbs & Co's paymaster and nothing more. This would not pre-

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sumptively authorize him to sign a final settlement with their sub-contractor. Besides, Jackson, one of the firm of Stubbs & Co., says in his testimony: "Mr. Mellen had no authority or instructions to sign receipts in full for our work, or make final settlements for us." This evidence is uncontradicted, and must be taken as true. We conclude, then, that Mellen's refusal to sign the settlement was not the refusal of Stubbs & Co., and that in the absence of such refusal it was not sufficient for plaintiffs to make the statement themselves. As a mechanic's lien is given solely by the statute, it can be established only by pursuing the steps pointed out by the statute.

REVERSED.

JOHNSON V. HARDER AND AVERY.

1. **Evidence: VENDOR AND VENDEE: VALUE OF PROPERTY.** Where there is a conflict in the direct evidence respecting the terms of a sale, the value of the property sold may be shown as a corroborative circumstance.
2. _____: _____: CONVERSATIONS. Evidence of conversations between vendor and vendee in relation to the sale, which took place some time before and constituted no part thereof, is not admissible.
3. **Mortgage: ATTORNEY'S FEES: LIABILITY OF PURCHASER.** The purchaser of land subject to a mortgage, who undertakes to discharge the mortgage, becomes personally liable upon a covenant in the mortgage that a reasonable attorney's fee shall be paid if the mortgage is foreclosed.

Appeal from Webster Circuit Court.

FRIDAY, APRIL 20.

ACTION to foreclose a mortgage executed by the defendant Harder, and to recover a personal judgment for the amount thereof against the defendant Avery. The petition avers in substance that the mortgaged premises were sold by Harder to Avery, and that Avery, as a part of the consideration of the purchase, agreed to pay the mortgage debt. Avery

45	677
88	701
45	677
98	806
45	677
102	143
102	370
45	677
141	374

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denies that he agreed to pay the mortgage debt, except upon the condition that Harder should perfect the title to a portion of the mortgaged land, which he failed to do. The facts are stated in the opinion. Decree of foreclosure and judgment against Avery for the mortgage debt. Avery appeals.

Theodore Hawley, for appellant.

O'Connell & Springer, for appellee.

ADAMS, J.—The mortgage was executed upon one hundred and eighty acres of land to secure a debt of \$635. After the execution of the mortgage, the defendant Harder, the mortgagor, sold the premises and some personal property to the defendant Avery.

What the consideration was is the question in this case. The plaintiff introduced evidence tending to show that Avery was to pay for the property, personal and real, the sum of \$500, and assume the mortgage debt. Avery introduced evidence tending to show that he was to pay the sum of \$575, and that he assumed the mortgage debt only conditionally as above set forth. The fact was that of the one hundred and eighty acres the title to only twenty acres was perfect. To the remainder the title was in controversy between Harder and the Des Moines Valley Railway Company, under a certain grant from Congress. This was well known to the parties and spoken of at the time of the trade.

Several witnesses were introduced upon each side to show what the terms of the trade were, and their testimony is clear and positive. According to the plaintiff's evidence the trade was made at Fort Dodge, about the 16th day of August, 1872. According to Avery's evidence it was made about the 20th of August, in Avery's barn. It is certain that there was a conversation about it at both places. The plaintiff's witnesses heard the former conversation, and the defendant Avery's witnesses heard the latter. Two of Avery's witnesses state that they were called upon to witness the trade, that it was stated to them formally and assented to by the parties, and that the

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assumption of the mortgage was made conditional upon the title to the one hundred and sixty acres being perfected.

The Circuit Court, however, was of the opinion that there was a preponderance of evidence showing that the trade had been made previous to that time, and that the payment of the mortgage debt was assumed by Avery unconditionally. The case is not triable *de novo*, and it is not our province to weigh the evidence and determine on which side the preponderance lies. It is claimed, however, by the appellant that the Circuit Court admitted improper evidence, and this question we are called upon to examine.

I. The plaintiff introduced evidence tending to show the value of the property, real and personal, sold by Harder to Avery. To this evidence Avery objected as ^{1. EVIDENCE:} ~~vendor and vendee: value~~ material. It has been seen that there was a great discrepancy in the terms of the trade as alleged by the respective parties, and strong evidence was introduced by each party in proof of their respective allegations. The question then is as to whether, under such circumstances, it is allowable for either party to show the value of the property as a corroborative circumstance?

If the property to which there was an undisputed title was of greater value than the amount to be paid without the assumption of the mortgage, could such fact be shown, to render more credible the testimony of the plaintiff's witnesses? It is clear that it could not be shown as independent evidence, and to rebut direct evidence of the terms of the trade. But where, as in this case, there is a conflict in the direct evidence of the terms of the trade, we are of the opinion that it may be shown as a slight corroborative circumstance. Where the difference in the alleged terms of the trade is not great, the value of the property would be a fact entitled to only the slightest if any weight. Persons' judgments often differ exceedingly in regard to the value of property. Besides, many persons make foolish trades.

Evidence of the kind in question should be admitted with great caution, and limited to its strictly legitimate province. The danger is that it will be used to affect the sympathy of

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the court or jury to secure the release of an improvident party from the trade actually made. On the other hand, where a case is to be determined upon the credibility of conflicting testimony, the circumstances which surround the case are naturally sought for, and considerable latitude of inquiry is oftentimes allowed. In the admission of the testimony in question, we are of the opinion that the Circuit Court did not err.

II. The plaintiff introduced evidence of conversations between Harder and Avery in relation to the trade, which 2. —: —: conversations took place some days previous to the time of the trade, and in which nothing was agreed to which constituted any part of the trade. Upon precisely what ground the evidence was admitted does not appear. We must presume that it was supposed that what was said at the previous talks was corroborative of the testimony as to the terms of the trade. But to our mind it could have no such effect. It would seem quite as probable that if the parties talked but did not trade, and afterward, on a different occasion, traded, the terms of the trade were different from those previously talked of. In admitting this evidence we think the Circuit Court erred, and, inasmuch as the evidence appeared to the court to be entitled to some weight, it is to be presumed that the court was somewhat influenced by it.

III. The notes in suit contained each an agreement in these words: "In case this note is sued, I agree to pay plaintiff's attorney's fees." Evidence was introduced 3. MORTGAGE: attorney's fee: showing that \$130 was a reasonable attorney's liability of purchaser. fee in the case, and that amount was included in the judgment against Avery. In this it is claimed by him that the Circuit Court erred; but we think otherwise. The evidence upon the point is as follows: To prove the bargain made by Avery the plaintiff introduced Harder as a witness, who said: "The bargain was that he (Avery) should give me \$500, and he was to take up the mortgage and pay for it all."

It is true the mortgage did not show that Harder was personally liable for an attorney's fee. It provided that in

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case of default the mortgagee should have a right to foreclose and make the amount of the notes, "together with a reasonable fee for plaintiff's attorney out of the aforesaid real estate." Now if Avery had simply bought the land subject to the mortgage he would not have been personally liable for any part thereof. But the evidence tends to show that he went further, and agreed to discharge the mortgage. Had he done so before foreclosure no attorney's fee could have been collected. After a decree of foreclosure was obtained he was still obligated by his contract, if Harder's statement of it is correct, to pay off the mortgage; but to pay it then it was necessary to pay an attorney's fee. We are of the opinion, then, that there was evidence tending to show that he became personally liable for such fee, and that the court did not err in allowing it.

We discover no other error than that above pointed out in the admission of testimony. For that the case must be

REVERSED.

JONES v. HETHERINGTON ET AL.

45	681
97	481
45	681
114	293
45	681
122	536

1. **Fraud: VENDOR AND VENDEE: INTENT OF VENDOR.** To defeat a sale it is not necessary to establish a fraudulent intent on the part of the purchaser, but it will be sufficient if it be shown that he knew of the fraudulent intent of the seller, or had notice of such facts as would have put a man of ordinary prudence upon an inquiry which would have led to a knowledge of the fraudulent purpose of the seller.
2. _____: _____. **POSSESSION.** A purchaser in good faith, who has paid a part of the purchase money, is entitled to the possession of the goods, notwithstanding he may subsequently discover that the vendor sold them with intent to defraud his creditors.

Appeal from Mahaska District Court.

FRIDAY, APRIL 20.

ONE A. H. Leake being the owner of a stock of merchandise, sold the same to J. C. Jones, the plaintiff herein. At

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the time of the sale Leake was indebted to the defendants in considerable sums of money. After the sale the defendants commenced suits in attachment against Leake and levied on the stock of merchandise. Plaintiff brought this action in replevin, claiming to be the owner under his purchase. The defendants claim that the sale was void, because it was made to hinder, delay and defraud the creditors of Leake. There was a trial by jury, verdict and judgment for the plaintiff, and defendants appeal.

Jno. F. Lacey and Hole & Hillis, for appellants.

Bolton & McCoy, for appellee.

ROTHROCK, J.—Upon the question as to the fraudulent character of the sale the court instructed the jury as follows:

"3. To successfully maintain the claim made that the alleged purchase by plaintiff was fraudulent as to the creditors of Leake, the alleged owner of the goods, the vendor and vendee : intent of vendor. defendant must satisfy you: *First*, that Leake made the alleged sale with the intent to hinder and delay, or cheat and defraud his creditors. *Second*, that the plaintiff knew of such intent or had such knowledge as would have put a man of ordinary care and prudence upon his inquiry, which would have led to such knowledge of such intent, *and that he participated in such intent, and took the goods for and with that purpose in view * * **"

This instruction requires that, in order to justify a finding that the sale was fraudulent, it must not only be shown that plaintiff knew of Leake's fraudulent intent, or had such knowledge as would have put a man of ordinary prudence upon inquiry, but that he participated in such intent; that is, that he also intended by his purchase to hinder, delay and defraud Leake's creditors.

A fraudulent intent upon the part of the purchaser is not necessary to be established to defeat the sale. It is sufficient if it be shown that he knew of the fraudulent intent of the seller, or had notice of such facts as would have put a man of ordinary prudence upon inquiry, which inquiry, made with ordi-

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nary diligence, would have led to a knowledge of the fraudulent purpose or intent of the seller. Kerr on Fraud and Mistake, 316, 317; *Zuver v. Lyons et al.*, 40 Iowa, 510.

We find nothing in the instructions to cure the error in that above set forth. It is true that there are some expressions which may be construed as meaning that actual participation in the fraudulent intent upon the part of the purchaser is not necessary, but the most that can be claimed for them is that they are impliedly contradictory of that now under consideration.

II. The consideration given by plaintiff for the stock of merchandise was \$150 cash, and a tract of land situated in 2. —: —: the State of Michigan, which was conveyed to the possession. wife of said Leake. The cash payment was made about the time that plaintiff took possession of the goods. The deed for the land was not delivered until after the commencement of this suit.

It is insisted by counsel for appellants that the delivery of the deed, after the commencement of this suit, was in fraud of the rights of Leake's creditors, and that at most Jones can only claim a lien on the goods to the extent of the \$150 which he paid before notice, and that his title instead of being absolute is limited.

Whether under such a state of facts the defendants should have garnished Jones before the delivery of the deed, or whether Jones can now be deprived of the benefit of his purchase, conceding that he had no notice of the alleged fraud until after title passed to him by taking possession and payment of part of the purchase money, we do not now determine, because no such question seems to have been presented in the court below. The instructions asked by defendants upon this feature of the case, which were refused by the court, are to the effect that if Jones or his agents had notice of the fraudulent design of Leake after taking possession of the property and payment of part of the purchase money, and before the delivery of the deed, this would preclude a recovery of the property by Jones in this action. If we were to adopt the appellant's theory as to the rights of the parties under this

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state of the case, Jones would have a right to recover the property and the extent of his interest would be \$150. There was, therefore, no error in refusing the instructions asked by defendants upon this branch of the case. There are other errors assigned and argued. They are exceptions to instructions given to the jury, and to the refusal to give other instructions asked by defendants. We do not believe these exceptions to be well taken.

For the error first above discussed the judgment will be reversed and the cause remanded for a new trial.

REVERSED.

MEADER v. LOWRY.

MARTZ v. THE SAME.

1. **Taxation: RAILROAD: NARROW GAUGE.** Where a tax had been voted to aid in the construction of a railroad, the fact that a narrow gauge road was constructed was held not to be a sufficient ground for restraining the collection of the tax.
2. **—: —: TRUSTEES.** After the construction of the road, the township trustees were guilty of no fraud in certifying to the fact that a railroad had been constructed, as contemplated in the notice of election.
3. **—: —: —.** The certificate of the trustees was not invalidated by the fact that it was signed in a place outside of the township.

Appeal from Polk Circuit Court.

FRIDAY, APRIL 20.

THE plaintiff in the first action is a resident property owner and taxpayer of Madison township, Polk county, and as such brought said action to restrain the collection of certain taxes certified and levied under the following circumstances, as stated in the petition:

An election was held in said township, in pursuance of a legal notice, for the purpose of determining whether a tax

Meader v. Lowry.

should be levied on the property in said township to aid in the construction of a "railroad from the city of Des Moines, in the State of Iowa, by way of Polk City, in said county, to Ames, in Story county, known as the Des Moines & Minnesota Railroad Company." A majority of votes were cast in favor of such proposition and the tax was levied by the proper authority, and the petition states:

"That in truth and in fact the railroad for which said tax was voted to aid, to-wit: the railroad referred to in said notice of election, has never been built, nor attempted to be built, by said Des Moines & Minnesota Railroad Company, or any other company.

"That by the term 'railroad,' as used in said notice of election, and as universally understood by all persons, was meant a line of railway of the ordinary gauge commonly and ordinarily used and constructed in this country, it being the only kind of a railway of which the electors of said Madison township had any knowledge, and plaintiff avers that said term 'railroad' was at that date commonly and universally so used and accepted, and that the kind of so-called railroad herein-after referred to was not then in use or known in this country; that the said defendant, the Des Moines & Minnesota Railroad Company, instead of constructing, equipping and operating the railroad described in said notice of election, undertook to construct, equip and operate a kind of road commonly known and designated as a 'Narrow Gauge Railroad,' being a so-called railroad constructed on a new, unusual and comparatively unknown plan, with an extraordinary gauge of track, then unknown to said electors, and of a vastly inferior capacity and carrying power, with equipments, rolling stock, ties, road-bed and rails, all of the lowest possible grade of construction in every respect, and having a gauge so narrow as to render it impossible for said road to transport and haul over its road the cars of any other company operating the usual and ordinary kind of railway, and that an improvement of the kind actually constructed was not contemplated by the electors, nor, as plaintiff believes, by the defendant, the Des

Meader v. Lowry.

Moines & Minnesota Railroad Company, at the time said vote was taken.

"That under the claim and pretense that the improvement constructed and operated, as described in paragraph seven hereof, was the 'railroad' for which said tax was voted to aid, the officers, agents and attorneys of said Des Moines & Minnesota Railroad Company, by fraud and fraudulent concealments and devices, procured certain individuals, claiming to be trustees of Madison township as at present constituted, to sign a paper, a copy of which is hereto attached and made a part hereof, marked Exhibit "B." That the board of trustees of Madison township consisted at that time of three persons, to-wit: Henry Crabtree, John Evans, and J. M. Householder; that the said Henry Crabtree and J. M. Householder, whose names were attached to said paper, well knew, as did also the said railroad company, at the time said paper was signed, that the railroad which the said tax had been voted to aid had not been constructed, nor any part thereof, but the said Henry Crabtree and J. M. Householder fraudulently and corruptly, and by the fraud and corrupt procurement of said railroad company, and well knowing that said so-called 'Narrow Gauge Railroad' was not the improvement that said tax was voted to aid, signed the said paper hereinbefore set out, and fraudulently and corruptly pretended that said paper constituted a certification under the law, the said paper having been signed by them with a view of aiding the said railroad company in their fraudulent and corrupt design to secure the said tax, to which they were in no manner entitled; that the tax payers interested had, prior to the execution of said paper, formally protested against a certification by the trustees of said township, and at a meeting of said trustees, held on or about the 8th of July, 1874, at which a portion of the tax payers of said township were present, and were also represented by counsel, it was agreed and resolved by said trustees, that before final action was taken in the matter of said certification the parties in interest should have an opportunity to be heard, and that due notice of a meeting of the trustees for that purpose would be given; that no such opportunity or

Meader v. Lowry.

notice was given; and plaintiff avers that no subsequent meeting was ever held, but that thereafter and about the month of September, 1874, the said Henry Crabtree and J. M. Householder secretly went from said Madison township to the city of Des Moines, and to the office of said railroad company in said city, which is not within the territorial limits of said township of Madison, and executed said paper, dating the same back to 2d of June, 1874; that no meeting, sitting, or session, was ever had of the trustees of Madison township, either in Madison township or elsewhere, at which a certificate to the county treasurer that said tax had ever been earned, was ever made or authorized to be made; that said trustees never met or acted upon said question as a tribunal constituted by law for the determination thereof at any time or place, except the meeting held July 8, 1876, above referred to; and there was never any subsequent action ever taken by said trustees as a tribunal or otherwise, in Madison township or elsewhere, except the execution of said paper marked Exhibit "B," by two of said trustees in the city of Des Moines, and under the circumstances and with the fraudulent design and purpose hereinbefore more fully set out.

"That the electors of said township never voted aid to the improvement constructed by the company."

Exhibit "B" referred to in the petition is a certificate signed by two of the township trustees, certifying that said railroad company had complied with the law under which the tax was voted and was entitled to a certain portion of the taxes.

There was a demurrer to the petition, which being sustained, plaintiff appeals.

Nourse & Kauffman, for appellant.

Barcroft, Given & Drabelle, for appellees.

SEEVERS, J.—I. That a railroad has been constructed and operated between the termini mentioned in the notice for 1. TAXATION: the election is not disputed; the ground of com-railroad: nar-plaint being that the gauge is narrow and unusual,

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and that the carrying capacity and power is inferior to the usual and ordinary railway. But it is not averred that the road in question does not secure to the plaintiff and other tax payers all the benefits of a road of broader gauge. The fact that the gauge is narrower or broader than was contemplated by the voter when he cast his ballot is not alone sufficient to deprive the company of the tax. If this were so, there must in all cases be a literal compliance, and one of a substantial character never would be sufficient. It is, we believe, a matter of controversy between experts in operating railroads whether the usual or a narrower gauge is the better and more economical. If the gauge was deemed important it should have been specified in the notice, and even then we apprehend a substantial compliance would have been sufficient. *Jenkins v. B. & M. R. R. Co.*, 29 Iowa, 255; *Cedar Falls & M. R. R. v. Rich*, 33 Iowa, 113.

The road constructed, to all intents and purposes, is a railroad, operated in the usual and ordinary manner, it must be presumed, as there is no showing to the contrary. Nor is it averred that it does not in every particular answer the purposes of the tax payers. It is not shown that the charges are greater than on other roads, or that all the business offering cannot be done in the usual manner as performed by other roads that have a broader gauge.

II. It follows from what has been said the trustees were not guilty of any fraud in certifying that the company had ~~2. —: —:~~ constructed a railroad as contemplated in the notice submitting the question of a levy of the tax. They did no more than they could have been compelled to do by *mandamus*, as there were no written promises or inducements save the notice of the submission to the tax payers. *Harwood v. Quinby et al.*, 44 Iowa, 385.

The only fraud alleged, as we understand the petition, on the part of the trustees, is that they certified that the road in question was a substantial compliance with the proposition submitted to the tax payers.

III. It was the duty of the trustees to look at and examine the road in question, for the purpose of determining whether

Meader v. Lowry.

the road the tax payers had voted to aid had been constructed ~~a~~ : ~~—~~: between the *termini* and on the route mentioned ~~a~~ : ~~—~~ in the proposition submitted to the voters. The city of Des Moines was one of such *termini*, and as the certificate was signed there we are not prepared to say it is absolutely void. The law fixes no place where such act may be done, and in the absence of any statute we are of the opinion it could be well done in the city of Des Moines. The trustees were not bound to consult the tax payers. The law cast on them a duty, which they should perform in accordance with their own judgment. In the present case they seem to have so consulted, heard arguments against giving a certificate if not in favor, and arrived at a conclusion that we hold to have been right and proper.

AFFIRMED.

THE SECOND ACTION

Is in all respects identical with the first, except that the plaintiff therein is a resident of the township of Crocker. In 1870, and after said tax was voted in the manner provided by law, Lincoln township was carved out of said township of Madison and duly formed, and at the same time the township of Crocker was formed, and it is partly composed of territory which formed a part of said Madison township at the time said tax was voted, and it is urged that the trustees of neither of the townships of Lincoln or Crocker have given the certificate required by law.

We are of the opinion this point is not well taken. The only certificate required by law is that of the trustees of Madison township.

AFFIRMED.

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Sigler v. Wick.

45	686
101	201
43	686
104	739
45	689
109	697
46	694
122	878

SIGLER v. WICK.

1. **Contract: VENDOR AND VENDEE: FORFEITURE.** Where a contract for the sale of land provided that "if the party of the second part fails to make payment at the time stipulated, or fails to pay the taxes when the same are due, the lots above described shall be considered forfeited," held, that the forfeiture was to be at the option of the vendor, and that the mere payment of taxes for his own protection did not imply that he elected to consider the lots forfeited and the contract void.

Appeal from Clarke District Court.

FRIDAY, APRIL 20.

On the 18th day of May, 1874, the parties hereto entered into a written contract in the following words:

"This agreement, between H. C. Sigler, of Osceola, Clarke county, Iowa, of the first part, and W. W. Wick, of the second part:

"*Witnesseth*, That the party of the first part has this day bargained to the party of the second part, lots No. (8 and 9) eight and nine in block No. seven (7), in town of Murray, as designated by the recorded plat of said town, for the sum of \$200.00. Now if the party of the second part shall, on or before the first day of April, 1875, pay to the party of the first part the sum of fifty dollars, and on or before July 1st, 1875, seventy-five dollars, and on or before January, 1876, seventy-five dollars, with interest at the rate of ten per cent per annum from date, and shall pay off all the taxes assessed on said lots after this date, the party of the first part shall execute to the party of the second part, his heirs and assigns, a warranty deed for the lots aforesaid; but it is expressly understood and agreed by all parties hereto, that if the party of the second part fails to make payment at the time stipulated, or fails to pay the taxes when the same are due, the lots above described shall be considered forfeited, and the party of the first part shall have the right to enter upon the possession of the same, and shall be held under no obligation whatever to the party of the second part."

Sigler v. Wick.

The petition in this case was filed in May, 1876, in which it is alleged that no part of the purchase money has been paid; that plaintiff paid the taxes upon said lots for 1874; that he has never at any time taken possession of said property; that he has never treated said property as forfeited, but has at all times relied upon the money demand stated in the contract, and that he only paid the said taxes to protect his interest. The prayer of the petition asked a judgment and decree of foreclosure of the contract. To this petition there was a demurrer, the substance of which is that it appears upon the face of the petition that a failure to make payment at the time stipulated, or to pay taxes, operates as a forfeiture of the contract and exonerates the defendant from liability. The demurrer was sustained, exceptions taken, and judgment rendered against plaintiff for costs, and he appeals.

Stuart Brothers, for appellant.

Likes & Smith, for appellee.

ROTHROCK, J.—The question here presented cannot well be determined upon the authority of adjudicated cases, because 1. ^{CONTRACT:} _{vendor and vendee: for} it rarely occurs that contracts of this character are precisely similar in terms. The contract is _{feiture.} unlike that construed in *Bradford v. Limpus*, 10 Iowa, 35. In that case the contract provided that if the purchaser should fail to pay the first deferred payment the vendor should take possession of the land and repay to the purchaser \$1200 of the \$1700 which was paid in hand. In effect it provided that in case no further payments should be made the contract was to be rescinded, and the purchaser to forfeit \$500 of what he had paid. In this case the contract provides as follows: "It is expressly understood and agreed by all parties hereto, that if the party of the second part fails to make payment at the time stipulated, or fails to pay the taxes when the same are due, the lots above described shall be considered forfeited." We do not think the expression that it is "agreed by all parties" adds any force, or in any way changes the meaning of the contract. The meaning would be the same

Sigler v. Wick.

if these words were omitted. The provision that the lots shall be considered forfeited for default in payment, we think, means only that such forfeiture shall be at the option of the plaintiff. This view is strengthened by the subsequent provision that upon such failure of payment the plaintiff shall have the right to enter upon the possession of the lots. We think this possession or some other unequivocal act should appear before the defendant can be absolved from liability upon the contract. The mere payment of taxes, for his own protection, is not taking possession by the vendor.

The general rule is that a stipulation that a contract for the sale of land shall become void upon non-payment is for the benefit of the vendor. 1 Smith's Leading Cases, 88. The contract in this case is more nearly like that construed in *Barrett v. Dean*, 21 Iowa, 423, than any to which our attention has been called by counsel. In that case it was held that the provision as to forfeiture was for the benefit of the vendor and not the purchaser. The contract provided that for failure to make payment the agreement should be from "thenceforth utterly void." In this case the language is that for a like failure the lots shall be considered forfeited. We think the reasoning of the opinion in that case well applies to the contract in the case at bar.

It is urged that there was no binding obligation upon the defendant to pay the purchase money. We think that the first clause of the contract contains such obligation. It is there recited that the party of the first part bargained the lots to the party of the second part for the sum of \$200. Then follows the designation of terms and amounts of the respective payments. In our opinion the demurrer to the petition should have been overruled.

REVERSED.

Reynolds v. Wilmeth.

REYNOLDS v. WILMETH.

45	693
102	159
45	693
106	721
45	693
114	285

1. **Tenant in Common: LIABILITY FOR RENT.** One tenant in common is not liable to his co-tenants for the use and occupancy of the common property in the absence of an agreement with them to pay rent, and of a demand from them to surrender possession, unless he has received rent for the property from a third person.

Appeal from Henry Circuit Court.

FRIDAY, APRIL 20.

This action is brought for the recovery of rent for plaintiff's interest in eighty acres of land. The cause was tried by the court, and judgment was rendered for plaintiff for \$13.34.

The defendant appeals.

Woolson & Babb, for appellant.

Palmer & Jeffries, for appellee.

DAY, CH. J.—The court submitted a finding of facts, the material portion of which is as follows: In 1860 William Thomas Van Winkle died intestate, without wife, issue or parent surviving, seized in fee of the real estate in petition described, which therupon descended equally to his brothers and sisters surviving him, Albert Van Winkle, Charity Reynolds, Margaret Scott and Jane Enfield; in 1861 Charity Reynolds died intestate, and her interest in the real estate descended to her four children, one of whom is the plaintiff, now about twenty-five years of age, who is, and for the last twelve years has been, the owner of an undivided one-sixteenth of said real estate; in 1861 one Mathews purchased the interest of Margaret and Jane in said real estate, and used, cultivated and occupied the same, so far as practicable, until 1863, when he sold and conveyed his interest to Ezra Connor, who used, cultivated and occupied said premises until 1866, when he sold to the defendant, Isaac Wilmeth, who used, cultivated and occupied the same, so far as prac-

Reynolds v. Wilmeth.

ticable, until the spring of 1873, when he sold his interest to Tabitha Karter, who thereupon took possession. The defendant Wilmeth, while he owned said interest, used, cultivated and occupied in person the premises, or so much as was practicable; no rent was received by him from others for the use of any part of the premises; he did not agree with plaintiff to pay rent; plaintiff never demanded of defendant possession of said premises, and defendant has never refused to surrender possession to plaintiff.

The question which appellant by his counsel submits for our consideration is the following: "*Is one tenant in common liable to his co-tenants for the mere use and occupancy of the entire lands, without any agreement with the others to pay rent, and without any demand from them for possession, or refusal to surrender possession, and without his having received rent for such premises from a third person?*"

The doctrine of the common law of England clearly is, that if one tenant in common occupied and took the whole profits the other had no remedy against him whilst the tenancy in common continued, unless he was put out of possession, when he might have his ejectment; or, unless he appointed the other to be his bailiff as to his individual moiety, and the other accepted that appointment, when an action of account would lie as against a bailiff of the owner of the entirety of an estate. Co. Litt., 199b; *Henderson v. Eason*, 16 Jurist, 518.

The statute of 4 Ann., C. 16, § 27, provides that an action may be maintained "by one joint tenant and tenant in common, his executors and administrators, against the other for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant and tenant in common." This statute was passed in the year 1776, prior to the union between England and Scotland, which was consummated in May, 1777, and hence constitutes part of the common law of this State. *O'Ferrall v. Simplot*, 4 Iowa, 381 (402). It was held, however, in *Henderson v. Eason, supra*, that this statute applies only to cases

Reynolds v. Wilmeth.

where one tenant in common receives money or something else from another person to which both co-tenants are entitled simply by reason of their being tenants in common, and in proportion to their interest as such, and of which the one keeps more than his just share according to that proportion; and that if one tenant in common has had the sole enjoyment of land, farmed it on his own account, and apportioned the produce to his own use, an action of account does not lie against him at the suit of his co-tenant under that statute.

In New York, under a statute taken from and substantially the same as the statute of Anne, the same doctrine has been maintained. *Woolver v. Knapp*, 18 Barbour, 265; *Dresser v. Dresser*, 40 Barbour, 300; *Wilcox v. Wilcox*, 48 Barbour, 327. In Massachusetts the same doctrine has been announced. *Sargent v. Parsons*, 12 Mass., 153. In this last case the court, through PARKER, Ch. J., said: "Nor is this law unreasonable; for if one joint tenant or tenant in common, finding the estate unoccupied by his companion, either from negligence or because he may not deem it for his interest to occupy it, should take the whole into his possession, it would be hard to make him liable for rent when, perhaps, he occupied the whole for little other reason than that it would otherwise be unoccupied. Besides, as each tenant is seized *per mi et per tout*, an entire occupancy by one, of any particular part, would subject him to an action as much as the entire occupation of the whole tenement; which would be absurd and unreasonable." The same view is maintained in *Israel v. Israel*, 30 Md., 120; *Everts v. Beach*, 31 Mich., 136; *Pico v. Columbet*, 14 Cal., 414. In this last case it is said that the contrary doctrine held by the Court of Appeals of South Carolina is believed to be peculiar to that court. See *Hancock v. Day*, *Thompson v. Bostic*, and *Holt v. Robinson*, 1 McMullen, Eq. Rep., 69, 75, and 475. The court, through FIELD, Justice, says: "The reasons upon which these decisions rest do not commend themselves to our judgment, and are insufficient to overcome the force of the English, Massachusetts, New York, and Kentucky authorities."

We feel no hesitancy in holding that the question submit-

Reynolds v. Wilmeth.

ted by appellant for determination must be answered in the negative.

II. Appellee, however, insists that there has been an *ouster* of plaintiff, and that therefore the right to recover for the occupation of the property exists. The finding of facts simply shows that there was a sole occupation and enjoyment of the premises by defendant, without denying any right of the plaintiff. That this does not constitute an ouster was held by this court in *Burns v. Byrne*, p. 28, *ante*.

The judgment of the court below is

REVERSED.

APPENDIX.

NOTES OF CASES NOT OTHERWISE REPORTED.

THE STATE V. BRENNAN ET AL.

EVIDENCE: SUFFICIENCY OF TO SUSTAIN VERDICT.

Appeal from Tama District Court.

MONDAY, DECEMBER 11.

THE defendants, Edward Brennan, Thomas Brennan and Patrick Brennan, were jointly indicted and convicted of an assault with intent to inflict great bodily injury upon the person of one Mrs. Goodfellow. The defendant Edward Brennan appeals.

I. M. Preston & Son, for appellant.

No appearance for the appellee.

ADAMS, J.—The only question presented in this case is as to whether the verdict is supported by the evidence. The prosecuting witness, Mrs. Goodfellow, states that all the defendants kicked her. One Murphy testifies that all the defendants engaged in the assault on Mrs. Goodfellow. On the other hand, six witnesses testified that the defendant Edward Brennan did not engage in the assault. These witnesses, however, all belonged to the Brennan family, except one Casey, and he was engaged in the quarrel upon the side of the Brennans.

One witness testified that Mrs. Goodfellow told him that the appellant did not touch her, but this she denies.

Evidence was introduced tending to impeach the character of the prosecuting witness. One witness was introduced tending to sustain her character.

The character of Murphy, witness for the State, was not impeached to any extent.

In such a conflict of evidence, we cannot regard it as within our province to disturb the verdict.

AFFIRMED.

THE STATE v. MAYER.

EVIDENCE: SUFFICIENCY OF TO SUSTAIN VERDICT.

Appeal from Muscatine District Court.

MONDAY, DECEMBER 11.

INDICTMENT for receiving stolen property. There was a jury trial, verdict of guilty, judgment, and defendant appeals.

D. C. Cloud, for appellant.

M. E. Cutts, Attorney General, for the State.

SEEVERS, CH. J.—It is urged that the verdict is against the evidence. We, however, are of the opinion the testimony is sufficient. The property stolen consisted of five head of fat cattle. They were stolen during the night of the 11th day of October, from the premises of the prosecutor who lived about sixteen miles from Muscatine. On the 12th day of October three of the cattle were found in the defendant's pens at his slaughter-house near Muscatine. The carcasses of the other two were found in his slaughter-house.

The cattle were worth three hundred dollars, and, according to his own statement, the defendant purchased them of some one early on the morning of the 12th day of October. The defendant made contradictory statements as to this man, that is, he described him differently at different times. According to the defendant's statements the man had either sixteen or twenty-one or two head of cattle in his possession at the time he made the purchase, and yet it so happened that he purchased only these particular five head. The only reason given for this was that he got or purchased the tired cattle. The defendant was unable to tell who the party was from whom he got the cattle, nor did he seem to know where he was going with the other cattle, except that his impression was that he was going toward Davenport. It is not shown that he made any efforts whatever to find this man, nor is any affirmative evidence of any description introduced by him. There are other circumstances that tend to prove the allegations in the indictment, which it is useless to take up time or space in setting out. A careful reading of the testimony separately by each member of the court, and a consideration thereof together, constrains us to say that we are united in the opinion that the testimony is sufficient to sustain the verdict.

It is claimed that the defendant was indicted and found guilty of stealing

this same property, and that the verdict was set aside by the court below because the evidence was insufficient, and it is claimed if the evidence in this case proves anything it proves that defendant stole the cattle, or rather that the evidence shows, if anything, that he was an accessory before the fact, and that if such be the case then under the statute he must be indicted and tried as a principal, and that a person cannot be convicted of receiving stolen goods upon evidence that proves him a principal or accessory before the fact.

We are unable to say, conceding the law to be as stated, that the evidence shows beyond a reasonable doubt that defendant is guilty of larceny. But we think it pretty clear that he received the cattle knowing them to have been stolen.

AFFIRMED.

MEADE v. THE K. C., St. J. & C. B. R. Co.

45	600
82	577
45	600
87	500

EVIDENCE: SUFFICIENCY OF TO SUSTAIN VERDICT.

Appeal from Fremont District Court

FRIDAY, DECEMBER 15.

It is alleged in the petition that defendant did, with its locomotive engine and train of cars, in consequence of defendant not having fenced and inclosed its railway as required by law, knock down, injure, bruise, run over, fatally injure, and entirely destroy, of the property of plaintiff, one two year old colt, of the value of one hundred dollars. The answer was a general denial. Verdict and judgment for plaintiff, and defendant appeals.

Sapp & Lyman, for appellant.

A. R. Anderson, for appellee.

ROTHROCK, J.—The plaintiff's colt was found in a cattle-guard upon the defendant's road. One of the bars of the cattle-guard was broken so as to allow the body of the animal to go through to the pit below. It was seriously injured, so much so that the jury found that it was worthless. There was no evidence tending to show that the colt was actually struck by the engine or cars of defendant. The only witness who testified in behalf of the plaintiff, as to the running of the train near the point where it is claimed the accident happened, was the plaintiff himself. He testified that the cattle-guard where the colt was found is about a mile from his house, that his house is about two hundred yards from the track, and he proceeded with his testimony as follows:

"The stock was all along the track on each side when this train came down in the evening, and seemed to be all on the track and some on each side; it commenced blowing at the horses, and they got frightened and all

took right down the track into the guards which were all closed in, and they could not get out; and this train frightened the horses so that they ran right down the track; they kept blowing but I did not see that the train stopped; it went about as fast when I last saw it as when it first commenced blowing * * * * * ; I did not see this mare get into the cattle-guard * * * * * ; as long as I could see the train it did not seem to slacken speed * * * * * ; when I saw them last they were about half way to the cattle-guard, and the train seemed to be very close to them, chasing and blowing; after that I could not tell what was going on; I do not know how my mare got into the cattle-guard."

This witness also stated that the railroad was fenced on both sides from the cattle-guard about half a mile in the direction of his house, at which point there was no fence on one side, and that he stood on the fence of his yard when the train passed, which was in the evening, a little after sunset; the colt was found in the cattle-guard the next day.

The engineer of the train in question testified to horses being about the track, as testified to by the plaintiff; that he blew the whistle and the horses were frightened and ran down the track, and then ran away from the track through an opening in the inclosure, and that none of them were chased down to the cattle-guard. In his cross-examination he uses this language: "I could distinguish a horse on the track half a mile; I could not have run upon a horse without seeing him at that time, if he had been lying above the track; no horse undertook to get out at this crossing where the cattle-guard was; they all crossed the track and went out above; I am positive I drove no horse down the track to this cattle-guard; it was light enough to see."

The fireman is equally positive in his statement that no horse was chased down to the cattle-guard, but that they crossed and left the track above. There is nothing in the testimony of these witnesses to lead us to think they are not truthful men. Their testimony does not conflict with that of plaintiff; he does not claim that he saw the horses nearer than half a mile of the cattle-guard in question. Under this state of facts the conclusion is irresistible that there is absolutely no evidence to sustain this verdict. The other alleged errors we need not discuss.

REVERSED.

BURROWS v. STRYKER.

45 700
8114 27
45 700
8117 434

APPEAL: EFFECT OF PAYING JUDGMENT: PRACTICE IN THE SUPREME COURT!

SATURDAY, DECEMBER 16.

PER CURIAM. A motion is made to dismiss the appeal on the grounds:
I. That the judgment has been paid off and satisfied.
II. That no transcript has been filed.
The judgment appealed from ordered a special execution to issue for the

sale of certain real estate, and such execution having been issued at the instance of the plaintiff, the defendant (appellant) paid the amount of the judgment to the clerk, under protest, reserving so far as he could by such protest his right to prosecute his appeal to this court, which had been taken previous to the issuance of the execution.

The money was paid to prevent a sale of the property under the execution. We do not regard this as a voluntary payment, nor did it in any manner affect the appeal or the right to further maintain it. No transcript has been filed, but an abstract has, which counsel for appellant maintains is full and perfect. The preparation of such abstract, filing it, and docketing the cause in this court, sufficiently show good faith in taking the appeal, and the like good faith as to its further prosecution. Code; *Grim v. Semple et al.*, 39 Iowa, 570. The appeal, therefore, cannot be dismissed, but the appellant must file a transcript if it is insisted on, and the cause be continued. A reasonable time will be allowed for obtaining a transcript.

NECK v. NECK.

PRACTICE IN THE SUPREME COURT: DIVORCE: TRIAL DE NOVO.

Appeal from Louisa Circuit Court.

WEDNESDAY, MARCH 21.

Sprague & Riley, for appellant.

No appearance for appellee.

BECK, J.—This is an action for a divorce. A decree was rendered granting the relief prayed for in the petition, and defendant appealed to this court. The grounds for the divorce alleged in the petition are habitual intoxication after marriage, and inhuman treatment endangering plaintiff's life. The cause was tried to the court without a jury.

The abstract fails to show that it contains all the evidence, and that the evidence was reduced to writing under Code, § 2742. If defendant, under the decisions of this court, be entitled to a trial *de novo* here, he can only have it upon all the evidence, taken as prescribed by the section cited, and properly certified, which must appear in the abstract. Having failed to comply with these requirements he cannot have a trial *de novo* in this court.

We cannot review the decision of the court below as in ordinary actions, for the reason that no errors are assigned. The judgment of the Circuit Court must be

AFFIRMED.

COLLINS V. LAUCIER ET AL.

DOWER: JUDICIAL SALE: VALIDITY OF STATUTE.

Appeal from Dubuque Circuit Court.

THURSDAY, MARCH 22.

THE plaintiff brings this action in equity, to recover dower in lot 105 in the city of Dubuque. Amongst other defenses the defendants plead the statute of limitations. The court rendered judgment for the defendants. The plaintiff appeals. The material facts are stated in the opinion.

Lewis A. Thomas, for appellant.

Platt Smith and W. H. Utt, for appellees.

Cooley & Rood, for appellee Bagley.

DAY, CH. J.—From the testimony and the admissions of the parties, the facts appear to be as follows: The plaintiff was married to George C. Collins in 1841, and is his widow. On the 1st day of November, 1841, Sylvester Laucier, being seized of lot 105, in the city of Dubuque, conveyed the same to Enoch Brown, but by mistake described it as lot 155. Brown commenced building a house on the northeast corner of the lot. On the 28th day of March, 1842, Brown sold and conveyed the lot to George C. Collins, and made the same mistake in description. Early in the fall of 1842, Collins let the contract for finishing the house to M. J. Sullivan. Early in the spring of 1843 Collins commenced cleaning out the house with the intention of moving into it, but he then obtained a clerkship in Washington and left suddenly without moving into the house. He never returned. On the 21st day of April, 1843, and soon after Collins moved away, Sullivan commenced suit against Collins, in the Dubuque District Court, for the establishment of a mechanic's lien, on account of the completion of said house, and, on the 2d day of September, 1843, he recovered a judgment for the sum of \$796.60, and the establishment of a mechanic's lien against said lot 105. On the 14th day of October, 1843, the lot was sold under execution to Sullivan for the sum of \$800, and on the same day a sheriff's deed was executed to him therefor. Sullivan entered into and kept possession of the property until the 15th day of May, 1844, when he sold to Mr. Mobley. On the 2d day of May, 1845, Daucier executed to Mobley a quit-claim deed for lot 105, reciting that it was for the purpose of correcting the error in the description in the original deed from Laucier to Brown. Mobley had possession of the property and received the rents until May 2d, 1851, when he sold to the defendant, Marcia A. Gonder, for the sum of \$2,000. Gonder remained in the possession of the whole property, paid taxes, and received the rents and profits until March, 1861, when she conveyed the south 20 feet of the lot to H. W. Sanford. During this time Gonder erected on the lot two three-story brick buildings, covering the whole front of the property, at a cost of about \$8,500. Ever since the sale to Sanford, Gonder has remained in the excl-

sive possession of the remainder of the lot, the north 40 feet, and has resided thereon. On the 31st day of August, 1867, Sanford conveyed the south 20 feet to the defendant, Frances E. Bagley. Since the sale of the south 20 feet Sanford and Bagley have been in the exclusive possession thereof, claiming to own the same, and receiving the rents and profits.

George C. Collins died on the 21st of March, 1865. On the 12th day of July, 1875, the original notice in this action was delivered to the sheriff with intent that it be served immediately, and on the 5th day of August, 1875, the plaintiff's petition was filed. We think it is clear that the plaintiff's claim for dower cannot be maintained.

On the 14th day of October, 1843, the lot, in which plaintiff claims dower, was sold under execution against her husband. The purchaser went into possession, and he and his grantees remained in exclusive possession, receiving rents and profits, paying taxes and making valuable improvements, for the period of twenty-one years and five months prior to the death of plaintiff's husband and for ten years and three months thereafter, and before this action was brought. The law in force respecting dower, at the time of the death of plaintiff's husband, was chapter 151 of the Laws of 1862, which provides that one-third in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, which has not been sold on execution or other judicial sale, to which the wife has made no relinquishment of her right, shall be set apart as her property in fee simple. The sale in question to Sullivan was made under chapter 155 of Laws of 1843, known as the valuation law. The plaintiff, by consent of defendants, introduced in evidence a letter of J. T. Young, Secretary of State, stating that he had examined the original bill, and found that the names of the Speaker of the House of Representatives and the President of the Council appear thereto, but that the Governor and Secretary of the Territory had failed to sign it. The plaintiff claims that, because of this failure, the act is a nullity and the execution sale is wholly void. The claim cannot be admitted. The amendment to the organic law under which the Territory of Iowa was acting at the time the law in question was passed, provides that "if any bill shall not be returned by the Governor within three days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it." Statutes of Iowa, p. 39. We cannot now, after a lapse of thirty-four years, presume against the validity of a law which has been published by authority, and during all that period recognized as binding, simply because the signature of the Governor is not attached. We must rather presume that the events happened which made it a law without the Governor's signature.

It is further claimed that, because of the repeal, by Chap. 92, Laws 1843, of the lien laws in force at the time the work was done, the judgment rendered against Collins is void. The first section of this chapter provides that "in all cases hereafter when any contract shall be made," etc., clearly showing that it was not intended that the chapter should have a retrospective operation; and section 9 provides that "this act shall be so construed as not to affect the rights of parties prior to its passage." It is quite clear that this statute in no way affects the lien of Sullivan.

Holding, as we do, that the sale under execution divested all the interest

of plaintiff's husband, it is unnecessary to consider whether the plaintiff's claim was divested by the statute of limitations, prior to her husband's death, or is barred by that statute since.

AFFIRMED.

ADAMS, J., having been of counsel, took no part in the decision of this case.

DOILL v. BOULTON & BRO.

EXEMPTION: FINDING OF FACT: EVIDENCE.

Appeal from Wayne District Court.

THURSDAY, MARCH 22.

THIS is an action to recover the value of a team of horses and a wagon taken upon an execution issued on a judgment in favor of defendants and against plaintiff. The ground upon which plaintiff bases his right to recover is that the property was exempt from execution, plaintiff being the head of a family and dependent upon the team for his support.

The answer of defendants denies that the property was exempt from execution and avers that it was voluntarily surrendered in execution by plaintiff. The court made a finding of facts, the cause being tried without a jury, and thereupon judgment was rendered for plaintiff. Defendants appeal.

J. B. Evans and John Hayes, for appellants.

No appearance for appellee.

BECK, J.—The court found that the property was exempt from execution and that plaintiff did not voluntarily give it up to be levied upon. Counsel for defendants insist that the findings of the court are erroneous, being in conflict with the evidence. The trouble with their case is that, while seeking to bring in review before us the decision of the District Court upon the facts, they have not seen proper to bring here all the evidence. The finding of facts by the court recites some of the evidence in the case, or more properly states some facts that were proved, but does not state that no other evidence or facts were before the court.

Counsel for defendants give us in the abstract little scraps of evidence, such as the return of the officers to the writ levied upon the property, to the effect that the levy was made by consent of the execution defendant, now plaintiff in this action. But it is nowhere stated or shown that we have before us all the evidence. We are not prepared to hold that the return of the officer, showing the voluntary surrender of the property by plaintiff, is conclusive and cannot be contradicted. While we may admit that it was

competent evidence in this case, we must presume that it was overcome by other proof before the court. Judgments of courts are not so easily disposed of here; presumptions are exercised in their favor. Error therein must affirmatively appear before we can disturb them.

AFFIRMED.

THE STATE v. McNABB ET AL.

CRIMINAL LAW: APPEAL.

Appeal from Keokuk District Court.

TUESDAY, APRIL 3.

SEEVERS, J.—The State appeals, but no argument has been made, nor have we even a brief statement of the points relied on by the State to obtain a reversal of the rulings of the court below. Under these circumstances we cannot undertake to look over the record, and for ourselves find error. If the officers of the State thought the court below erred, they should at least have briefly indicated wherein. It is not made our duty to be diligent in ascertaining whether there has been error or not, nor are we disposed to take upon ourselves labor that appropriately belongs to others.

AFFIRMED.

SMITH v. THE MERCHANTS' DESPATCH TRANSPORTATION CO

COMMON CARRIER: ASSIGNMENT: EVIDENCE.

Appeal from Linn Circuit Court.

WEDNESDAY, APRIL 4.

West & Eastman, for appellant.

R. H. Gilmore, for appellee.

ROTHROCK, J.—The same questions are presented in this case which are determined in the case of *Robinson Bros. & Gifford v. The Merchants' Despatch Transportation Co.*, p. 470, ante.

In this case the goods destroyed by fire were owned by the plaintiff and two other parties in separate parcels. It was averred in the petition that the other owners had assigned their claims to the plaintiff. There was a general denial in the answer. It is claimed by appellant that there was no

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proof of the alleged assignments to plaintiff. The plaintiff in his testimony states that "the said claims against the defendant are my property." There is no evidence in the record in conflict with this as to the ownership of the claims, and we think this proof of ownership was sufficient to support the allegation of the petition that plaintiff was the owner by assignment.

AFFIRMED.

ADAMS, J., took no part in the determination of this case, and SEEVERS, J., *dissent*s.

GRANGER v. COOPER ET AL.

TRIAL: EVIDENCE: CONVEYANCE.

Appeal from Story Circuit Court.

THURSDAY, APRIL 5.

ACTION in chancery brought by a wife to set aside a deed in which she united with her husband to convey their homestead, on the ground that its execution on her part was not voluntary but procured by compulsion exerted by her husband, with the knowledge of the grantees who are defendants to this suit. There was a decree dismissing plaintiff's petition, from which she appeals.

S. F. Balliet and J. L. Dana, for appellant.

Thompson & McCall, for appellees.

BECK, J.—I. The first objection urged by plaintiff to the decree of the Circuit Court is based upon the alleged facts that the cause was tried before the judge of that court as a referee; that the trial was had in vacation and judgment then rendered in the cause for costs against plaintiff, including the sum of twenty dollars taxed as the fees of the judge, he merely acting as the referee. But this objection is readily disposed of by the simple remark that the record utterly fails to support these allegations of facts upon which plaintiff assails the decree.

II. Plaintiff seeks relief on the ground that she executed the deed, which she asks may be set aside, through coercion of her husband with the knowledge of defendants. She alleges that the act on her part was induced by the threats of the husband to abandon his family and her desire to preserve her family unbroken. We think the evidence fails to support her allegations. That she executed the conveyance reluctantly appears, but it is not shown that such coercion or duress was exercised toward her, as to deprive her of freedom of action. To our minds it is satisfactorily shown that plaintiff ex-

ecuted the deed voluntarily. After its execution she voluntarily left the premises, which were taken possession of by defendants, and for months she quietly acquiesced in the sale of the land. She delayed bringing this action for more than eight months after she joined in the conveyance with her husband and, during all this time, made no complaint. These facts tend to support the conclusion that the deed was executed by her voluntarily. The discussion of the evidence here, which leads us to these conclusions, would demand time and space that, under our practice, is not devoted to questions of fact. The judgment of the Circuit Court is

AFFIRMED.

SOMERS v. WHEELER.

JUDICIAL SALE: REDEMPTION FROM.

Appeal from Jones Circuit Court.

WEDNESDAY, APRIL 18.

THIS is an action in equity to set aside a certificate of purchase and sheriff's deed to defendant for lots one and nine, in block one, in the town of Olin, Jones county, and to permit plaintiff to redeem from the sheriff's sale; and also to set aside a deed from plaintiff to defendant for a part of lot ten, in block one, in said town. The court rendered a decree for plaintiff, as prayed in the petition. Defendant appeals.

A. B. Oakley, for appellant.

S. T. Pierce and J. W. Jamison, for appellee.

DAY, CH. J.—Lots Nos. one and nine, in controversy, owned by plaintiff, were on the 11th day of July, 1874, at sheriff's sale, sold to Nancy A. McKean for the sum of \$669.07. About the last of October, 1874, the certificate of purchase was assigned to the defendant, and, on the 30th day of July, 1875, defendant procured a sheriff's deed therefor. The plaintiff, claims that the transaction whereby defendant became possessed of the certificate of purchase was a loan to plaintiff, upon from three to five years time, of money to effect redemption from Mrs. McKean, and that the certificate of purchase was assigned to defendant as a mere security for repayment, and was held by him in lieu of a mortgage. The defendant, upon the other hand, maintains that he bought the certificate of purchase from Mrs. McKean, and that, at the expiration of the period of redemption, he was entitled to a sheriff's deed. The case presents solely this question of fact. Each member of the court has read the evidence with care, and has each come to the conclusion

that it satisfactorily and fully sustains the decree of the court below. Indeed, it rarely happens that in a case, presenting solely questions of fact, we are able to reach a conclusion with so little doubt. It is neither necessary nor desirable that the evidence should be fully reviewed, and a partial review would not be satisfactory. We have no hesitancy in holding that the decree should be

AFFIRMED.

CAPITAL BANK OF TOPEKA v. GARVIN ET AL.

CONVEYANCE: EVIDENCE OF FRAUD.

Appeal from Davis District Court.

WEDNESDAY, APRIL 18.

Weaver & Payne, for appellant.

Trimble & Carruthers, for appellees.

ROTHROCK, J.—It appears from the pleadings in this case that David H. Johnson was the owner of a farm in Davis county, Iowa, and a house and two lots in the city of Topeka, Kansas. W. J. Garvin was the owner of a farm in Douglass county, Kansas. In December, 1873, an exchange of the property owned by said parties was made, by which Johnson conveyed to the wife of Garvin the farm in Iowa, and the house and lots in Topeka, and Garvin conveyed to the wife of Johnson the farm in Kansas.

At the time of these conveyances, Johnson was largely indebted to the Capital Bank of Topeka, appellant herein. It is sought in this action to impeach said conveyances for fraud, and to subject the land in Iowa to the payment of the debt of Johnson to the bank. The court below rendered a decree dismissing the plaintiff's petition. The plaintiff appeals.

We have all the evidence before us, and a careful examination of it has brought us to the conclusion that the decree of the District Court is correct. A discussion of the evidence here would serve no useful purpose. It is enough to say that, in our judgment, the alleged fraud is not sufficiently established to warrant us in holding that the conveyance should be set aside and the land subjected to the payment of plaintiff's debt.

AFFIRMED.

BROWN v. COLLINS.

PRINCIPAL AND AGENT: LIABILITY OF AGENT FOR MISREPRESENTATIONS TO PRINCIPAL.

Appeal from Davis District Court.

THURSDAY, APRIL 19.

THE plaintiff, a resident of Illinois, owned a tract of land in Iowa, and had mortgaged the same to the defendant to secure a note for \$271.70. The defendant, by authority from plaintiff, sold said land for two promissory notes of \$100 each and two horses. In his report to plaintiff, by letter, he said: "They are a couple of pretty good horses. I took them at two hundred dollars—the two; and he (the purchaser of the land) is to give me one hundred dollars on delivery of the deed. * * * * I want you to send it by mail immediately, for I want to settle the thing up, and I will send your note and satisfy the mortgage on record."

The deed was accordingly sent by plaintiff to the defendant, and by him delivered to the purchaser of the land. No cash was paid on its delivery, and it does not appear that there had been any agreement that there should be. The purchaser gave his promissory note for \$100, payable to the defendant with ten per cent interest, and also gave him another note for \$100, made by one Gorman. The notes and horses were retained by defendant, and appropriated to his own use. This action is brought to recover the difference between what the defendant received for the land and what he reported that he received, to-wit: the amount of one note. Judgment for defendant. Plaintiff appeals.

Traverse & Eichelberger, for appellant.

Trimble & Carruthers, for appellee.

ADAMS, J.—I. The defendant does not deny, either in his answer or his testimony, that he received the two notes and appropriated the same to his own use and concealed the fact from the plaintiff. As to the appropriation, he says that the Gorman note had been surrendered to Gorman, and he does not say that it was not paid in full. The other note he caused to be executed payable to himself, and he of course took it at its face. Besides, the note was past due when he testified, and he does not say that it was not paid in full. He says, however, that the horses were not worth two hundred dollars, and the court below allowed evidence to be introduced against the objection of the plaintiff for the purpose of showing that the horses were not worth that amount. The court found that they were not worth that amount. The admission of such evidence and the finding of the court thereon are assigned as error. What the defendant and purchaser of the land estimated the horses at as between themselves is wholly immaterial. The horses, by virtue of the trade, became the plaintiff's horses, and they were not worth more or less by reason of any estimate which was placed upon them. When defendant reported that

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he had taken the horses and was to have \$100 in cash, and would surrender plaintiff's note if plaintiff would send a deed, and plaintiff did send a deed, the title to the horses passed to defendant and plaintiff's note became discharged, although the defendant took a note for the \$100, instead of the cash. It is true, the plaintiff might have been under obligation from what had passed between the parties to send the deed even if he did not approve of defendant keeping the horses and cash payment or note for his debt; but, the transaction taken altogether shows that it was understood that defendant should keep them for his debt. At all events, the defendant did keep them and appropriate them, and it is not for him to say that he did it without any understanding with the plaintiff to that effect. If there was an understanding, it was in accordance with the terms of the defendant's letter. We must, then, regard the plaintiff's note as paid by the horses and the note for \$100 executed to defendant by the purchaser of the land. The Gorman note the defendant cannot avoid accounting for on the ground that under that arrangement with the plaintiff he made a poor trade.

II. The evidence tends to show that defendant paid taxes on the land to the amount of \$16.50. But when the taxes were levied does not appear, and under the evidence, as disclosed in the record, the defendant is not entitled to recover therefor.

REVERSED.

DOTY v. CHASE.**EVIDENCE: SUFFICIENCY TO SUPPORT FINDING**

Appeal from Calhoun District Court.

THURSDAY, APRIL 19.

ACTION to recover specific personal property. Trial to the court, finding for the defendant and judgment accordingly. The plaintiff appeals.

Jolly & Rollins, for appellant.

Geo. B. McCarty, for appellee.

SEEVERS, J.—Substantially but a single error is assigned, and that is that the evidence is not sufficient to sustain the finding of the court. Under the settled practice of this court it is sufficient to say that the finding is not so manifestly against the evidence as to warrant us in setting it aside.

AFFIRMED.

NICODEMUS v. HARVEY ET AL.

Appeal from Clay District Court.

THURSDAY, APRIL 19.

Samuel Gonser, for appellant.*L. M. Pemberton*, for appellee.

ROTHROCK, J.—The precise question in this case was determined in *The Sterling School Furniture Co. v. Harvey et al.*, p. 466, ante. Both causes were submitted upon the same abstract. Following the opinion in that case this must be

AFFIRMED.

SMITH & SON v. SYPES ET AL.

PRACTICE IN THE SUPREME COURT: TRIAL DE NOVO: ASSIGNMENT OF ERRORS.*Appeal from Hardin Circuit Court.*

FRIDAY, APRIL 20.

ACTION to foreclose a mortgage. One of the defendants, John Hall, has a mechanic's lien upon the mortgaged premises which he claims is paramount to the mortgage. Decree for plaintiffs, establishing their mortgage as paramount. The defendant, Hall, appeals.

Porter & Moir, for appellant.*Huff & Reed*, for appellees.

ADAMS, J.—This action is consolidated with another action brought by said Hall to establish his mechanic's lien. In that action Smith & Son moved for a trial upon written evidence. In this action Hall moved for a trial upon written evidence. The court denied the motion in each case, and neither party excepted. It is now objected by the appellees that the case cannot be tried *de novo*. To this the appellant replies that all the evidence upon the trial was taken down in writing and is contained in the bill of exceptions, properly signed by the judge. But it was not ordered to be taken down, and we have held that such order is necessary to make the case triable *de novo* in this court.

The appellees further object that there is no assignment of errors and that

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therefore the case is not triable at all. If the case is not triable *de novo*, it can be tried only on assignment of errors, and there being no assignment the case must be

AFFIRMED.

CAPEON V. FULLER ET AL.

Appeal from Boone Circuit Court.

FRIDAY, APRIL 20.

ROTHROCK, J.—The questions involved in this case are substantially the same as in the case of *Caroline S. Sanders et al. v. C. Godding et al.*, p. 463, *ante*. Following that case the plaintiff is entitled to one acre and no more, and the land must be ascertained and measured in the same manner as indicated in that opinion. The cause will be reversed and remanded for that purpose.

REVERSED.

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ADMINISTRATOR.

1. **CONFLICT OF JURISDICTION: POSSESSION OF NOTE.** Where an administrator is appointed in the jurisdiction where decedent resided, he becomes the principal and primary administrator, and is entitled to the possession of a note which had been the property of decedent, notwithstanding the subsequent appointment of another administrator in the county where the real estate is situated which was mortgaged to secure the note. *Chamberlin v. Wilson et al.*, 149.
2. **AUTHORITY OVER REAL ESTATE.** Unless the personality is insufficient for the payment of debts, the administrator has nothing to do with the realty, which descends to the heirs at law. *Gray v. Myers*, 158.
3. **ANCILLARY ADMINISTRATOR: RIGHTS OF NON-RESIDENT CREDITORS.** Non-resident creditors have the right to prove their claims under an ancillary administration; if the ancillary estate is solvent, the administrator may proceed to pay the claims against that estate in full, unless it be shown that the principal estate is insolvent, in which case the non-resident creditors are entitled to share in the ancillary estate. Whether they should be postponed in respect to all payments from the ancillary estate until they have exhausted their claim upon the principal estate, *quare.* *Miner, Beal & Hackett v. Austin*, 221.
4. **ORDER OF PROBATE COURT: ESTOPPEL.** An order of discharge of an administrator does not amount to an adjudication that an heir of the intestate, whom the administrator reported that he was unable to find, is in fact dead, nor will it estop such heir or his creditors from claiming his distributive share of the estate. *Crosley v. Calhoon et al.*, 557.
5. **EVIDENCE: ADMISSIBILITY.** An authenticated copy of a confession of judgment in another State by the heir was *held* to be admissible in an action to recover his share from the other heirs, among whom the estate had been distributed. *Id.*

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2. That he could not afterwards recover the amount thereof from the grantor, the discharge of the latter releasing him from further liability upon his covenants. *Parker v. Bradford*, 311.

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CITIZENSHIP.

- 1. REMOVAL FROM COUNTRY.** Removal from the country and residence under another government for a period of years does not deprive one of his citizenship in this country. *The State v. Adams*, 99.
- 2. CITIZENSHIP OF CHILD.** The citizenship of the child is determined by that of the father, and though the latter reside in another country the child will be a citizen of this if the father has not forfeited or surrendered his allegiance thereto. *Id.*
- 3. MILITARY SERVICE.** Involuntary military service in a foreign army by a citizen of this country, and the acceptance of a bounty therefor, does not have the effect to deprive him of his citizenship here. *Id.*

See STATUTE OF LIMITATIONS, 1.

CLERK OF THE COURT.

- 1. COMPENSATION OF: PROBATE BUSINESS.** Prior to September 1, 1873, the board of supervisors was authorized to allow the clerk a reasonable compensation for services in probate matters, in addition to the fees then allowed him by law, but such compensation could not exceed the amount collected by him for probate business. *Washington County v. Jones*, 260.
- 2. ——: HOW TO BE PAID.** The compensation of the clerk was limited to \$2,000 a year, but this was to be paid out of the fees of his office, and if they were less than that amount exclusive of the fees collected for probate business, his compensation was correspondingly less. *Id.*
- 3. ——: LIMIT OF.** Under the Code, his entire compensation for all official services is limited to \$2,000 per annum. *Id.*

4. ——: DEPUTY. He is entitled in addition, however, to such an allowance for the hire of a deputy as may be reasonable, in view of the amount of labor demanded by the duties of his office. *Id.*

COMMON CARRIER.

1. CONTRACT OF AFFREIGHTMENT: PRINCIPAL AND AGENT. A contract of affreightment made by the consignor for the consignee is binding upon the latter, and in the absence of fraud or mistake he will be conclusively presumed to know its stipulations. *Robinson Bros. & Gifford v. The Merchants' Despatch Transportation Co.*, 470.
2. ——: VALID IN ANOTHER STATE. If such a contract is valid under the laws of the State where it is made, it will be binding upon the consignee who may be the resident of another State. *Id.*
3. ——: BILL OF LADING. Where a contract of affreightment is evidenced by a bill of lading which is partly printed and partly written the contract is to be gathered from the whole instrument, and a stipulation that the carrier will transport the merchandise "without transfer, in cars owned and controlled by the company" constitutes a part thereof, a breach of which, occasioning a loss of the goods by fire, does not entitle the carrier to the protection of another stipulation of the bill of lading, that the carrier will not be responsible for such a loss. *SEEVERS, J., dissenting.* *Id.*
4. ——: DAMAGES. In an action for damages for the loss of goods under such a contract the plaintiff is entitled to interest on their value, at six per cent, from the time when they ought to have been delivered. *Id.*

CONSTITUTIONAL LAW.

1. STATUTES NOT EMBRACED IN CODE: SWAMP LAND FUND. Statutes which are public and special, whose subjects are not revised in the Code, are not repealed unless their provisions are repugnant to the enactments of the Code, and in this class are included the statutes upon the subjects of Swamp Lands and the Swamp Land Fund. *Gray et al. v. Mount et al.*, 591.

See CONTRACT, 4.

MUNICIPAL CORPORATIONS, 15, 16.

PRACTICE IN THE SUPREME COURT, 5.

RAILROADS, 5, 6, 7.

STATUTE OF LIMITATIONS, 4.

VENDOR'S LIEN, 2.

CONTRACT.

1. RESCISSION. An executory contract may be rescinded upon a failure by the obligor to perform the conditions thereof, and a restoration of him, or an offer to restore him, to the position he occupied when the contract was entered into. *Anderson v. Haskell et al.*, 45.

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2. ——: TITLE BOND. A party is not bound to accept money in payment for land and surrender a bond therefor, if payment is offered before the time fixed in the contract, nor will such offer prevent him from rescinding the contract if payment is not made according to its terms. *Id.*
3. CONSTRUCTION: SWAMP LANDS. Where a proposition for appropriating the swamp and overflowed lands of a county to aid in the construction of a railroad had been ratified by the voters of a county, and a contract in accordance therewith had been made with the company, *held*, that the contract could not be extended to embrace a cash indemnity paid by the government to the county for swamp lands sold before selection. *Palmer v. Howard County*, 61.
4. CURATIVE ACT: CONSTITUTIONAL LAW. A subsequent act of the legislature, whose preamble recited that "the proceeds" of the swamp lands had been donated to the company, was *held* invalid to support its claim to the indemnity. *Id.*
5. CONSTRUCTION OF: RAILROAD. Where a party agreed that he would give to a railway company a sum named if the railway should be constructed, and a train running to "within one mile of Elkport Post Office" at a time specified, and the road was built at the time named in the contract and the depot located within one mile of the post office, and on the day specified a passenger train ran to a point within two hundred yards of the depot, it was *held* that the company had substantially complied with the terms of the contract and the subscriber was liable thereon. *The C. D. & M. R. Co. v. Scheve*, 79.
6. SALE OF GOOD WILL. A contract for the sale of the good will of a business does not bind the vendor to abandon his trade or occupation, and he may serve as an employe of one who is engaged in the same kind of business in the same place. *Grimm v. Warner et al.*, 106.
7. INTERPRETATION OF. The doctrine of surplusage does not apply to contracts, and while words which are meaningless may be disregarded, those which have a meaning must be considered in ascertaining the intention of the parties. *The City of Decorah v. Kesselmeier et al.*, 166.
8. ——: BOND. A bond provided for a forfeiture if the defendant should sell "any vinous or malt liquors to any intoxicated, card-playing, whatsoever person or habitual drunkard": *Held*, that it was intended to prohibit the sale to an intoxicated and card-playing person. *Id.*
9. AFFREIGHTMENT. A contract between a shipper and a transportation company stipulated that the latter would ship the goods of the former to two points named at the lowest rates; it appeared that to one of the points specified the company had carried the goods of another party at lower rates than those of the party to the contract: *Held*, that this entitled him to recover back from the company the difference only upon the goods shipped to that particular point, and not upon those carried to both the destinations mentioned in the contract. *Murphy, Neal & Co. et al. v. Creighton*, 179.
10. CONSTRUCTION OF: RESCISSION. Where the owner of a horse placed him in the hands of another to be trained and driven for a specified time, reserving to himself the right to take possession of the animal whenever he became dissatisfied with the manner in which he was kept and trained, he was not entitled to take the horse from the trainer without showing some negligence or ill treatment on the part of the latter, or other grounds justifying him in rescinding the contract. *Barr v. Van Duyn*, 228.

11. ——: DAMAGES. The trainer was entitled, after the rescission of the contract, to the reasonable value of his services in training and keeping the horse during the time he was in his possession. *Id.*
12. WHEN MADE ON SUNDAY: TRANSFEREE NOT PREJUDICED. A written contract made on Sunday, but bearing the date of another day of the week, may be transferred, and will be enforced in the hands of a transferee in good faith and without notice. *Johns v. Bailey et al.*, 241.
13. SUBSEQUENT PROMISE: CONSIDERATION. If one leases land to which there is no road to another party, but subsequently promises to procure one, the fact that without the road the lessee would not be able to pay his rent does not constitute a sufficient consideration for the promise. *Hendrahan v. O'Regan*, 298.
14. ——: DISADVANTAGE TO PROMISEE. While disadvantage accruing to the promisee may constitute a sufficient consideration for a promise, yet it must appear that the disadvantage was suffered at the request of the promisor, express or implied. *Id.*
15. CONSTRUCTION OF. Where a party undertook to cut all the timber upon a certain piece of land, but subsequently and in the same contract it was stipulated that he should not be required to cut any which would cost more than fifty per cent above the ordinary price of cutting, *held*, that the contract did not contemplate the cutting of all the wood unless the average cost should be above the maximum fixed in the contract, but that he was not bound to cut any particular cord of the wood which would exceed the price fixed. *Wadleigh v. Shaw et al.*, 535.
16. VENDOR AND VENDEE: DEMAND. Where, by the terms of a contract between vendor and vendee, the purchase price of merchandise was to be paid in cash or the notes of third parties, at the option of the vendee, the indebtedness of the vendee accrued upon the delivery of the merchandise, and a demand for the notes need not be shown to entitle the vendor to a right of action thereon. *The Davis Sewing Machine Co. v. McGinnis et al.*, 538.
17. CONSTRUCTION OF. Where a contract provided for the delivery of one hundred thousand brick, to be counted and enumerated according to the custom of bricklayers, *held*, that the contractor was bound to furnish only the number specified according to such estimate, even though as a matter of fact the number was less than one hundred thousand. *Brown v. Cole et al.*, 601.
18. COMPETENCY OF: CUSTOM. It is competent for parties to enter into a contract in accord with an established usage or custom recognized by both, and the contract will be binding upon them. *Hughes v. Stanley*, 622.
19. ——. The present case distinguished from *Johnson v. Brown*, 37 Iowa, 200. *Id.*
20. RECEIPT FOR GRAIN: WAREHOUSEMAN. While the receipt of a warehouseman for grain received by him may be evidence indicating that the transaction is a sale, yet it will not be received to defeat the conditions of an oral agreement between the parties. *Id.*
21. VENDOR AND VENDEE: FORFEITURE. Where a contract for the sale of land provided that "if the party of the second part fails to make payment at the time stipulated, or fails to pay the taxes when the same are due, the lots above described shall be considered forfeited;" *held*, that the forfeiture was to be at the option of the vendor, and that the

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mere payment of taxes for his own protection did not imply that he elected to consider the lots forfeited and the contract void. *Sigler v. Wick*, 690.

See COMMON CARRIER, 1-4.

EVIDENCE, 1, 17.

MINOR.

PRINCIPAL AND AGENT, 1.

RAILROADS, 8.

SERVICES, 2.

VENDOR'S LIEN, 3.

CONVEYANCE.

1. COVENANTS. The grantor cannot escape liability upon the covenants in a deed on the ground of mistake therein when the deed expressed what both parties intended, and he was simply mistaken as to the legal effect of the instrument. *Gerald v. Elley*, 322.
2. ——: RIGHT OF WAY. The fact that the grantees knew of the existence of a railroad over land conveyed to him with the usual covenants of warranty, will not entitle the grantor to a reformation of the deed excepting such incumbrance from its covenants. *Id.*
3. EXPRESSED CONDITION. Where a conveyance is made upon a condition, the condition expressed in the deed must be conclusively presumed, in the absence of fraud, accident or mistake, to be the only condition, and if that is kept the title cannot be assailed. *Dunbar v. Stickler et al.*, 384.
4. ——: TIME OF PAYMENT. Where the time of payment fixed in a deed is upon a day specified "if required or demanded," a reasonable time is allowed after demand in which payment may be made. *Id.*
5. ——: CONSIDERATION. A conveyance will not be deemed voluntary and improvident when made in consideration of an agreement for the payment of money which is enforceable in an action at law. *Id.*
6. WHEN NOT FRAUDULENT: JUDICIAL SALE. Where a party who is indebted to another procures a conveyance of real estate which he has purchased to be made to the creditor, and the latter receives it in good faith with no other apparent intention than to secure his claim, his title will not be defeated by a subsequent confession of judgment by his grantor in favor of another creditor, and a sale of the property under execution issued upon the judgment. *Moss & Co. v. Dearing et al.*, 530.
7. ADMINISTRATOR. Where a father conveyed to his sons, with covenants of warranty, certain realty upon which there were incumbrances, held, that after his death the incumbrances were debts of his estate and not of his grantees. *Sharpless v. Gregg*, 649.

See HOMESTEAD, 2.

LANDLORD AND TENANT, 3.

WILL, 5-7.

CORPORATION.

1. **LIABILITY OF STOCKHOLDER: JURISDICTION.** Where the assets of a corporation, with assessments upon the shares of stockholders, are sufficient to meet the corporate obligations, the stockholders are not liable in addition to an amount equal to their shares of stock, and the question of such sufficiency can be determined in an action at law. *Stewart v. Lay*, 604.
2. ———: **LIMITATION OF.** The liability of one stockholder is not limited by the amount which can be collected from other stockholders. *Id.*
3. ———: **ACTS OF RECEIVER.** The fraudulent acts or neglect of the receiver of an insolvent corporation constitute no defense to an action against a stockholder for contribution. *Id.*
4. ———: **EQUITIES BETWEEN STOCKHOLDERS.** The liability of the stockholder is separate from that of the other stockholders and may be enforced in an action at law, in which it is not essential to the establishment of his liability that the equities between him and his associates be determined. *Id.*

See GARNISHMENT, 1, 2.

RAILROADS.

COUNTY AUDITOR.

1. **LIABILITY OF SURETIES: COMPENSATION OF.** The sureties upon the bond of a county auditor are liable for any overdrafts he may have made by issuing warrants payable to himself and receiving from the treasurer the amount thereof, in excess of the compensation allowed him by the board of supervisors. *Mahaska County v. Ruan et al.*, 328.
2. ———: **SCHOOL FUND JUDGMENT.** The auditor is not authorized to receive money collected upon judgments in favor of the school fund, and his sureties are not liable for an amount thus collected and paid by the clerk to the auditor. *Id.*

See HIGHWAY, 7, 8.

COUNTY SEAT.

1. **RELOCATION OF: POWER OF SUPERVISORS.** The board of supervisors are not authorized, after a petition and remonstrance have been presented to them respecting a change in the location of a county seat, to consider an application by any number of the signers that their names be stricken from the remonstrance. *Loomis et al., v. Bailey et al.*, 400.
2. ———: **PETITION.** To entitle the applicants to a submission of the question to the people, the number of signers to the petition should not only be at least one-half the legal voters of the county, but should also be greater than the number of remonstrants thereto. *Id.*

CRIMINAL LAW.

1. **PRACTICE: CONTINUANCE.** The defendant is not entitled to a continuance for the reason that a witness examined before the grand jury, and subpoenaed by the State, is not in attendance at the trial. *The State v. Hayden*, 11.

2. **EVIDENCE: IMPEACHMENT.** The minutes of evidence given before the grand jury, or of that submitted upon preliminary examination, are not admissible upon the trial for the purpose of impeaching a witness. *Id.*
3. **INDICTMENT: TWO OFFENSES.** An indictment charging the defendant with feloniously and burglariously breaking and entering a store with intent to commit larceny, and with stealing and carrying away certain articles therein contained, was held not liable to the objection that it charged two distinct offenses. *Id.*
4. _____. At common law indictments for burglary and larceny in this form have been held not to be bad for duplicity. *Id.*
5. **ACCOMPlice.** The fact that one has received stolen property, knowing the same to have been feloniously obtained, does not constitute him an accomplice in the burglary by which possession of the goods was acquired. *Id.*
6. **REASONABLE DOUBT.** Where the evidence is circumstantial, the jury need not be satisfied beyond a reasonable doubt of every link in the chain of circumstances necessary to establish defendant's guilt; it is a reasonable doubt of guilt arising from a consideration of all the evidence in the case which entitles the defendant to an acquittal. *Id.*
7. **EXTENT OF PUNISHMENT.** The crime of which defendant was convicted was the breaking and entering of a store, and stealing therefrom articles of the value of \$70; the defendant was a young man, and the circumstances of his offense and his subsequent conduct did not indicate him to be a hardened criminal: *Held*, that his term of punishment should be reduced from eight to three years. *Id.*
8. **EVIDENCE: INTENT.** The guilty intent of a party may be shown by his acts, conduct and declarations after, as well as before and at the time of, the commission of the criminal act. *The State v. Lewis*, 20.
9. _____. **ADMISSIONS.** When the admissions of the defendant are supported by circumstances, a fact which constitutes but one ingredient of the crime may be established thereby. *Id.*
10. **ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER.** An assault with intent to commit manslaughter is included in an assault with intent to commit murder, and an indictment for the latter offense will sustain a conviction for the former. *The State v. White*, 325.
11. **ASSAULT WITH INTENT TO COMMIT RAPE; EVIDENCE.** Under an indictment for assault with intent to commit rape, evidence of previous assaults upon the prosecutrix is admissible to show the intent with which the act charged was committed. *The State v. Walters*, 389.
12. **EVIDENCE: ANOTHER OFFENSE.** Evidence of another distinct substantive offense is not admissible to establish defendant's guilt of the offense laid in the indictment. *Id.*
13. **PRACTICE: INSTRUCTION.** It is the duty of the court to instruct the jury that if they have a reasonable doubt of the degree or character of the assault, they should only convict of a lower degree of crime included within that charged in the indictment. *Id.*
14. **ATTEMPT TO ESCAPE: INSTRUCTION.** Whether or not one charged with an offense made an attempt to escape after its commission is a question for the jury, and where there is evidence tending to show that the attempt was made an instruction respecting its legal effect is proper. *The State v. James*, 412.

15. SEDUCTION: PREVIOUS CHARACTER. In a prosecution for seduction the previously chaste character of the prosecutrix is presumed, but such presumption may be rebutted by proven or admitted facts, or the circumstances of the case. *The State v. Bowman*, 418.
16. LARCENY: IDENTITY OF PROPERTY. To sustain a conviction for larceny based upon the possession of the stolen property by the defendant, the identity of the property should be satisfactorily established. *The State v. Osborne*, 425.
17. SALE OF INTOXICATING LIQUORS. A party cannot be convicted of the unlawful sale of intoxicating liquors upon the sole testimony of one in his employ that the witness upon one occasion sold to a purchaser a small quantity of liquor, without specifying in his testimony that it was the property of his employer, or that the latter had any such liquor in his possession. *The State v. Findley*, 45.
18. EVIDENCE: BASTARDY. In an action charging a party with being the father of an illegitimate child, evidence that the complaining witness shared her bed with one who might have been the father of the child is admissible, as tending to affect the credibility of the testimony of the complaining witness. *The State v. Read*, 469.
19. PRACTICE: JURY. Where a challenge to a juror for cause was overruled, and the defendant who had not exhausted his peremptory challenges failed to challenge the juror peremptorily, the ruling of the court upon the challenge for cause, if erroneous, was error without prejudice. *The State v. Elliott*, 486.
20. EVIDENCE: DYING DECLARATIONS. It is the province of the court to determine the competency of what are offered as dying declarations, but evidence tending to show whether or not the testimony offered is of the character it purports to be is admissible for the enlightenment of the court. *Id.*
21. ____: _____. Proof that the deceased was a materialist could not be received to affect the admissibility of his dying declarations. *Id.*
22. ____: _____. Such proof, however, is competent for the purpose of assailing the credibility of the witness and lessening the weight of his dying declarations. *Id.*
23. ____: AFFIDAVIT. An affidavit not in the language given by the deceased to the party who drew it, and not read over to him after being written out, is not admissible. *Id.*
24. ____: THREATS. Evidence of threats made by deceased against the defendant and not communicated to him, is not admissible. To this rule the only exception occurs where violent threats are made by the deceased a short time before the occurrence, and the question arises whether or not the defendant perpetrated the act in self-defense. *Id.*
25. INTOXICATING LIQUORS: NUISANCE. The selling of intoxicating liquors for any purpose whatever, without permission first obtained from the board of supervisors, is a misdemeanor, and any person who uses a building for this purpose is guilty of committing a nuisance and may be punished therefor. *The State v. Waynick*, 516.
26. LARCENY. Where one sold a steer which had been placed in the pound, claiming the animal as his own, and showed upon the trial that he had owned one resembling it in appearance, but failed to prove that his animal had strayed away or that he had made inquiry for it, *held*, that his conduct was inconsistent with a claim of ownership in the property. *The State v. Hunt*, 673.

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27. ——: WHAT CONSTITUTES "TAKING." The sale of the animal to another, and authorizing him to take the animal from the pound, constituted such a "taking" as made the act his own. *Id.*

See EVIDENCE, 14.

NEW TRIAL, 6.

CUSTOM.

See CONTRACT, 18.

DAMAGES.

1. AMOUNT OF: PERSONAL INJURY. In an action for damages for personal injuries, the amount of the award for loss of power to earn money, and for pain and anguish suffered by reason of the injury, rests within the discretion of the jury. *Morris v. The C., B. & Q. R. Co.*, 29.
2. WHEN RECOVERABLE. Damages are recoverable only when they are the proximate consequence of the act complained of, and not when they are the secondary results thereof, either alone or in combination with other circumstances. *Georgia v. Kepford*, 48.
3. ——: SLANDER. An action for divorce on the ground of inhuman treatment, alleged to have been occasioned by a charge of larceny and adultery against the husband, cannot be made the basis of an action for damages. *Id.*
4. ——: ——. Desertion of the husband by the wife in consequence of the publication of a charge against him for larceny and adultery is not such a natural and proximate consequence of the slander as to entitle him to special damages therefor. *Id.*
5. ——: ——. *Semble*, that if the charge had been made for the purpose of inducing the desertion, special damages would have been recoverable therefor. *Id.*
6. FUTURE PHYSICAL SUFFERING. While future physical suffering is a proper element of damages, yet the damages should be limited to such as would result with reasonable certainty from the injury complained of and should not be left to mere conjecture. *Fry v. The Dubuque & Southwestern R. Co.*, 416.
7. NUISANCE: CONTINUANCE OF. Whenever a nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character that will continue without change from any cause but human labor, then the damage is an original damage and may be at once fully compensated. *Powers v. The City of Council Bluffs*, 652.
8. ——: SUCCESSIVE ACTIONS. Successive actions are not allowed for damages resulting from negligence combining with a natural cause, however gradual the operation of the cause, and they will only lie where the defendant is continuously in fault. *Id.*
9. ——: MUNICIPAL CORPORATION: STATUTE OF LIMITATION. Where the defendant, a city, had constructed a ditch along a street by plaintiff's property in such a negligent and unskillful manner that his property was injured thereby, it was held that the damage resulting from

the construction of the ditch was original damage, and that the right of action was barred in five years from the time when the injury to the property began. *Id.*

See COMMON CARRIER, 4.

CONTRACT, 11.

EVIDENCE, 19.

HIGHWAY, 5, 6.

INJUNCTION, 1.

PRINCIPAL AND AGENT, 6.

RAILROADS, 9, 10, 11, 16, 17.

SLANDER, 6.

DEED.

1. CONSTRUCTION: DISTANCES AND AREAS. Where the distances and areas in the description of a deed do not correspond so as to describe the same quantity of land, the terms describing the distances will control that describing the area, and measure the quantity conveyed, in the absence of words indicating that the latter is to prevail. *Sanders et al. v. Godding et al.*, 463.

See EVIDENCE, 17.

DIVORCE.

See PRACTICE, 12-18.

DOWER.

1. SALE OF REALTY: RES ADJUDICATA. Where an administrator instituted proceedings in the probate court for the sale of realty to discharge the debts of decedent, making the widow a party, and process was duly served upon her, and the land sold under the order of court, held, that the right of the widow to dower was adjudicated in the proceedings for the sale of the land, and that she could not afterward maintain an action therefor. *Olmsted v. Blair et al.*, 42.

ELECTION.

1. FORM OF BALLOT: TAXATION. When the question of voting a tax in aid of a railway company was submitted to the voters of a township, and the trustees prescribed that the ballots should have written upon them the words "For Taxation" or "Against Taxation," and certain electors cast ballots bearing the words "Against taxation for the benefit of railroad companies or any other monopolies to the indebtedness of the poor man;" Held, that such ballots should be counted the same as if they were in the form prescribed by the trustees. *Cattell v. Lowry et al.*, 478.
2. PROPOSITION FOR OUTLAY OF MONEY. In the submission to the electors of a proposition for the outlay of money, two distinct objects, each calling for a certain specified amount of funds, cannot be included in one proposition, so that the voter shall be unable to vote for the one and against the other. *Gray et al. v. Mount et al.*, 591.

See SWAMP LAND, 1.

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EQUITY.

See CORPORATION, 4.

JUDGMENT, 1.

ESTOPPEL.

1. WHAT WILL NOT CREATE: STATUTE OF LIMITATIONS. Possession of land, taken without a valid title thereto, after a termination of occupancy by the owner and a failure to pay the taxes thereon, will not estop him to subsequently assert his title when the possession has not been continued long enough to entitle the occupant to the protection of the statute of limitations. *Sanders et al. v. Godding et al.*, 463.

See ADMINISTRATOR, 4.

HIGHWAY, 11.

MUNICIPAL CORPORATIONS, 4.

EVIDENCE.

1. ADMINISTRATOR: SERVICES. In an action against an administrator to recover upon an implied contract for services rendered the deceased, the plaintiff cannot be permitted to testify to the facts which would raise an implied promise. *Peck v. McKean*, 18.
2. OBJECTION: GROUNDS OF. When objection is made to the admission of evidence the ground of objection must be stated, or the ruling will not be reviewed on appeal. *Id.*
3. MATERIALITY: RAILROAD. In an action against a railway company for damages for causing the death of plaintiff's intestate, evidence to the effect that the company offered to pay the latter's funeral expenses is not material. *Campbell v. The C. R. I. & P. R. Co.*, 76.
4. INSANITY: HEARSAY. The physician's certificate, prepared from the statements of relatives and friends of a patient in the insane asylum, is not competent evidence to show what had been the mental condition of the patient previous to his confinement in the asylum. *Butler v. The St. Louis Life Ins. Co.*, 93.
5. ——: RECORDS OF PUBLIC INSTITUTION. The records of a public institution must be shown to have been kept in compliance with the laws of the institution before they are admissible in evidence, and the laws themselves must be introduced to establish the fact. *Id.*
6. ——: OPINION OF WITNESS. The opinion of a witness who is not an expert, respecting the sanity of a person, is competent where he states all the facts upon which his opinion is founded. *Id.*
7. ——: EXPERT. In the trial of an issue of insanity, it is not competent for a medical expert to give his opinion respecting the testimony which has been introduced in the case, but the inquiry should be limited to his conclusion respecting the facts. *Id.*

8. WHEN EXECUTOR IS A PARTY. In an action upon a promissory note by the executors of the assignee of the note, wherein the defendant averred that the alleged assignee was really the agent only of the payee, and that he had made payment to the agent, it was held, that the court might, in a trial without a jury, exclude the testimony of the defendant in support of his averment. *Williams v. Brown et al.*, 102.
9. TITLE: ADMISSIONS. Where in an action involving title to land the one party has admitted in the abstract attached to his petition the chain of title insisted upon by the other, the latter has no need to substantiate his claim by the introduction of the patent and deeds. *Easton v. Randall*, 111.
10. ORDER OF: PRACTICE. The order of the introduction of evidence rests largely in the discretion of the trial court, and its action in permitting the plaintiff to offer testimony not rebutting after the defendant has closed his testimony will not be disturbed where no abuse of discretion is shown. *Carman v. Roennan*, 135.
11. PLEADING: STATUTE OF FRAUDS. A parol contract which is within the statute of frauds may be established if not denied in the pleadings or if admitted by the party against whom it is sought to be enforced, but in such case the petition should state the manner in which it is expected that the contract will be proved, otherwise it will be subject to demurrer. *Babcock v. Meek*; 137.
12. CONFLICT OF: PRACTICE. Where there is a conflict in the evidence, a judgment will not be reversed because there was not sufficient evidence to sustain the verdict. *Wayt v. The B., C. R. & M. R. Co.*, 217.
13. HUSBAND AND WIFE: PRACTICE. In a civil action the husband and wife are not competent witnesses against each other, but objections to their competency should be made when they are sworn, or when it is proposed to examine them, and, if not then made, will be deemed to have been waived. *Watson v. Riskamire et ux.*, 231.
14. TESTIMONY OF WIFE: CRIMINAL LAW. The testimony of a wife in behalf of her husband in a criminal case is to be received, and her credibility is to be tested by the same rules which apply to all other witnesses, and it is error to instruct the jury that her testimony should be examined with peculiar care. *The State v. Bernard*, 234.
15. INSTRUCTION. Evidence admitted without objection cannot be excluded from the consideration of the jury by instructions. *Becker v. Becker et al.*, 239.
- 16 EXPERT TESTIMONY. Whether in a given case a shaded object would be rendered visible by artificial light shining from a certain specified point is not a question of technical knowledge or trained observation, but is rather a matter of judgment based upon common observation and a knowledge of the reflecting surfaces in the particular case, and is not, therefore, a proper subject for expert testimony. *Weane v. The K. & D. M. R. Co.*, 246.
17. CONSIDERATION FOR DEED: MAY BE SHOWN BY PAROL. A deed is not evidence of the contract between the grantor and grantee, but simply the final consummation of the contract, and payment of the purchase money, together with possession of the property sold, constitutes a part performance sufficient to take the antecedent contract, where it rests in parol, out of the statute of frauds, and thus permit the introduction of oral evidence showing what the contract in fact was. *Trayer v. Reeder*, 272.

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18. **ADMINISTRATOR: SERVICES.** In an action against an administrator for services rendered the decedent, the plaintiff cannot be permitted to testify in his own behalf to the facts which would raise an implied contract to pay for the services. *Smith v. Johnson et al.*, 308.
19. **DECLARATIONS: DAMAGES.** A party is permitted to testify to the statements made by him to another, which were the inducement to the act of the latter, in an action to charge him with damages for the act. *Van Tuyl v. Quinton*, 459.
20. **ADMISSIONS.** In an action to set aside a conveyance as fraudulent, the admissions of the grantor to third persons before the conveyance was made that he was indebted to the grantee are admissible. *Moss & Co. v. Dearing et al.*, 530.
21. **BOOK OF ACCOUNT: VENDOR AND VENDEE.** While the testimony of a witness, in an action upon an account, may not be competent when he shows that his only knowledge of the transaction between the parties was based upon the plaintiff's books of account, yet he may testify to the receipt of orders from the defendant for merchandise and such orders themselves are admissible. *The Davis Sewing Machine Co. v. McGinnis et al.*, 538.
22. **WAIVER: RAILROADS.** Evidence showing that the employes of a railroad company were accustomed to act in violation of a rule of the company is not admissible to establish a waiver of the rule, unless it be shown that the custom was known to the officer charged with the enforcement of the rule. *O'Neill v. The K. & D. M. R. Co.*, 546.
23. **ADVERSE POSSESSION: BOUNDARY LINE.** In an action to settle a boundary line between parties owning adjoining sections, where they stipulated that each was the owner in fee of the section he claimed, and where in the petition plaintiff claimed to own a division fence extending beyond the limits of his section, evidence tending to prove his adverse possession of the disputed area by the plaintiff for more than twenty years was admissible. *ADAMS, J., dissenting. Meyer v. Weigman*, 579.
24. **NEGLIGENCE: SIDEWALK.** In an action against a city for damages on account of injuries caused by the negligent condition of a sidewalk, evidence tending to show that its condition has been improved subsequent to the accident is not admissible as an admission of negligence by the defendant. *Cramer v. The City of Burlington*, 627.
25. **BOOK OF ACCOUNT: LIMIT OF INDEBTEDNESS.** The books of the secretary of a school district, showing the amount of its indebtedness, are admissible in an action against the district upon its orders, wherein it is pleaded that they were issued in excess of the legal limit of indebtedness. *Wormley v. The District Township of Carroll*, 666.
26. **FRAUDULENT AGREEMENT: CONSIDERATION.** The defendant having alleged that the indebtedness which was the cause of action was incurred by reason of a fraudulent agreement between plaintiff and its own agents, it was competent for plaintiff to show that the indebtedness was sustained by a valid consideration. *Id.*
27. **VENDOR AND VENDEE: VALUE OF PROPERTY.** Where there is a conflict in the direct evidence respecting the terms of a sale, the value of the property sold may be shown as a corroborative circumstance. *Johnson v. Harder and Avery*, 677.

28. ——: CONVERSATIONS. Evidence of conversations between vendor and vendee in relation to the sale, which took place some time before and constituted no part thereof, are not admissible. *Id.*

See ADMINISTRATOR, 5.

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EXECUTION.

1. RELEASE OF ATTACHED PROPERTY: SHERIFF. An officer who holds goods in his possession under a writ of attachment may, at his discretion, release the same upon the claim of a third party that he is their owner; but the officer does so at his peril, and he has the burden of establishing that the attached property did not belong to the execution defendant. *Wadswoorth & Co. v. Walliker*, 335.

2. ——: EVIDENCE. In an action for damages against the officer for the release of the property, the latter may introduce evidence to show that the execution defendant was not the owner of the attached property. *Id.*

FENCES.

1. ON DIVISION LINES: RIGHTS OF ADJOINING OWNERS. One who incloses land adjoining another's close, and does not own any part of the division fence, may throw any portion of such land open to common at pleasure. *Miner v. Bennett*, 635.

2. ——: WHAT CONSTITUTE. While a lawful fence is not necessary between adjoining farms to constitute occupation in severalty, still the partition fence must be such as will turn stock, and premises separated only by a hedge which is insufficient for that purpose must be considered as inclosed in common, within the meaning of section 1496 of the Code. *Id.*

FRAUD.

1. VENDOR AND VENDEE: INTENT OF VENDOR. To defeat a sale it is not necessary to establish a fraudulent intent on the part of the purchaser, but it will be sufficient if it be shown that he knew of the fraudulent intent of the seller, or had notice of such facts as would have put a man of ordinary prudence upon an inquiry which would have led to a knowledge of the fraudulent purpose of the seller. *Jones v. Hetherington et al.*, 681.
2. ——: POSSESSION. A purchaser in good faith, who has paid a part of the purchase money; is entitled to the possession of the goods, notwithstanding he may subsequently discover that the vendor sold them with intent to defraud his creditors. *Id.*

See EVIDENCE, 26.

TAX SALE AND DEED, 3.

VENDOR AND VENDEE, 1-3.

FRAUDULENT CONVEYANCE.

1. RIGHTS OF CREDITORS. A conveyance from the husband to the wife, without consideration, is a fraud upon the creditors of the husband even in the absence of an actual fraudulent intention, and this is especially true when the conveyance leaves the husband insolvent. *Watson v. Riskamire et ux.*, 231.
2. EVIDENCE. Facts considered which were held to render a conveyance fraudulent. *Ryan & Co. v. Mullinix et al.*, 631.

See CONVEYANCE, 6.

EVIDENCE, 20.

GARNISHMENT.

1. WHEN PROPERTY IS LIABLE: PRINCIPAL AND AGENT. It is not necessary that one should have the independent possession of the property of another, coupled with the right to maintain the custody and control of it, to render it subject to garnishment in his hands. Although he may act under the orders of another who has the disposition of the property, yet he may still be liable as a garnishee in an action against their common employer. *The First National Bank of Davenport v. The Davenport & St. Paul R. Co.*, 120.
2. RULE APPLIED. C. was the cashier and auditor of a railway company, and was garnished as a debtor holding funds of the latter. After service of the process he surrendered the key of the safe to another employe who in his absence removed the funds of the company therefrom; in his capacity as an employe of the company, he acted under the orders of a general manager who had the entire control and disposition of the moneys of the company in the hands of the cashier: *Held*, that the latter was liable as garnishee. *Id.*

3. MUNICIPAL CORPORATION. The rule that municipal corporations shall not be garnished is not limited to cases where it would interfere with the discharge of corporate duties but is universal in its application. *Jenks v. Osceola Township*, 554.
4. ——: PRACTICE. An objection based upon the exemption of municipal corporations from garnishment need not be made before the commissioner, but will be in time if raised when the answer is filed. *Id.*

GUARANTY.

1. WHAT CONSTITUTES. In response to an order for goods, plaintiffs replied that they would not deliver them unless the purchaser would procure some one to guarantee payment for them; the purchaser answered, stating that defendant had offered to assist him, and defendant indorsed upon the letter his agreement to the proposition: *Held*, that he was liable as guarantor. *Westphal, Hind & Co. v. Moulton*, 163.
2. INDORSEMENT. Where the guarantor undertook to insure the payment of all indebtedness of his principal to the guaranteee, whether consisting of accounts, notes, indorsement of notes or otherwise, the guarantor was held to be liable upon notes which his principal transferred to the guaranteee, with no other indorsement than simple words of guaranty. *The Davis Sewing Machine Co. v. McGinnis et al.*, 538.
3. NOT TO BE EXTENDED. If, under the contract of guaranty, the guaranteee took other or different notes than those provided for in the contract, or gave additional time for payment to the principal, or waived any material condition on which payment was to be made, the guarantor was released from liability. *Id.*
4. NOTICE BY GUARANTOR. A request by the attorney of the guarantor that a copy of the bond be sent him with authority to sue both principal and guarantor is not such a compliance with section 2108 of the Code as will discharge the guarantor if the guaranteee does not bring the suit within ten days thereafter. *Id.*

GUARDIAN AND WARD.

1. ADJUSTMENT OF ACCOUNTS. The adjustment of the accounts of the guardian of a deceased person must be made with the administrator, subject to the approval of the court. *Ordway & Husted v. Phelps*, 279.

HIGHWAY.

1. PRESCRIPTION. In the strict sense of the term, a highway cannot be established by prescription, since there can be no such thing as a grant to the public, but common usage has applied the term to highways whose existence is based upon long and continuous use. *The State v. The K. C., St. J. & C. B. R. Co.*, 139.
2. ——: ANIMUS DEDICANDI. A highway which is opened and used with the assent or acquiescence of the owner will be presumed to have been intentionally dedicated by him to the use of the public, but his assent will be presumed only when he is aware of the use of his property by the public, or when the facts will justify the presumption that he is aware of its use. *Id.*
3. ——: UNINCLOSED LANDS. The use of wild and uninclosed timber or prairie land by the public as a highway will not raise a legal presumption that the owner had notice of the use of the land for such purpose. *Id.*

4. **NOTICE: SUFFICIENCY OF.** A mistake in the notice and petition for the establishment of a highway, respecting the proposed location thereof, will defeat the jurisdiction of the board of supervisors to establish the highway, if the mistake be of such a character that a person would not readily discover it. In considering the sufficiency of the notice, extrinsic facts are not admissible to explain it. *Butterfield et al. v. Pollock et al.*, 257.
5. **VACATION OF: DAMAGES.** The vacation of a highway does not confer upon an individual residing thereon a right of action for the recovery of damages, even though he may suffer inconvenience or loss thereby. *Barr v. The City of Oskaloosa et al.*, 275.
6. **USE BY RAILWAY COMPANY: DAMAGES.** Nor can the owner of abutting property recover damages for such a use of a street or highway as essentially deprives it of its character as a public highway. *Id.*
7. **AUTHORITY OF AUDITOR.** The county auditor is not authorized to establish a highway of less than sixty-six feet in width, the power to establish such an one being vested in the board of supervisors alone, who may exercise it for good and sufficient reason. *The State v. Wagner et al.*, 482.
8. **— : BOARD OF SUPERVISORS.** The auditor having illegally established a highway forty feet wide, the board of supervisors has jurisdiction to vacate the same. *Id.*
9. **CONTROL OF ROAD FUND: ROAD SUPERVISOR.** The township trustees have not control over the road fund in the hands of the township clerk, save that part of it which may be set aside for general township purposes; the balance is to be expended in his discretion by the road supervisor, and he has a right to demand and receive it from the township clerk. *Henderson v. Simpson*, 519.
10. **EFFECT OF NON-USER.** Where a highway has been established by the proper legal authority, although never actually opened, mere non-user for a period of ten years will not operate to defeat the right of the public therein, where there has been no adverse use of the land. *Davies v. Huebner*, 574.
11. **ADVERSE POSSESSION: ESTOPPEL.** Where there had been an entire non-user of a highway for a period of thirty years, and half of the same in width had been inclosed, fenced and in open, notorious and adverse possession for more than ten years, it was held that the public would be estopped to claim any right in the part thus inclosed. The other half having been but recently inclosed, the right of the public thereto had not been impaired. *Id.*

HOMESTEAD.

1. **PRE-EMPTION: PUBLIC LANDS.** The purchase of the improvements of a pre-emptor, and the subsequent occupancy of the land by the purchaser, does not give to it the character of a homestead. *De Land et ux. v. Day & Son*, 37.
2. **— : CONVEYANCE.** Nor can one acquire a homestead right by furnishing the money for the purchase of the improvements of another, who subsequently conveys to him, nor by a conveyance from a pre-emptor. The pre-emptor can only acquire title for himself, and cannot convey to another any interest acquired by pre-emption. *Id.*
3. **ESTATE OF DECEDENT: LIEN OF JUDGMENT.** A judgment recovered against the wife, after her homestead rights have accrued, is not a lien

upon the distributive share in the estate of her husband which she elects to have set apart to her, in lieu of the homestead, after the death of her husband. *Briggs v. Briggs et al.*, 318.

4. **INCUMBRANCE UPON: ANCEDENT DEBT.** Under the Code of 1851 and Revision of 1860, the homestead could be sold only to supply a deficiency existing after exhausting the other property of the debtor liable to execution, whether the debt existed before the purchase of the homestead, or was contracted afterward and secured by mortgage on the homestead. *Higley & Co. v. Millard et al.*, 586.
5. ——: **NOTICE.** A mortgage upon the homestead was of no validity unless both husband and wife united in the execution, and the record of it, therefore, imparted no notice to a subsequent purchaser. *Id.*

See **REDEMPTION**, 1.

VENDOR AND VENDEE, 4.

HUSBAND AND WIFE.

See **EVIDENCE**, 13, 14.

FRAUDULENT CONVEYANCE, 1.

INJUNCTION.

1. **ACTION UPON BOND: DAMAGES.** In an action upon an injunction bond for damages for the wrongful suing out of the writ, the plaintiff may recover for the services of counsel in the preparation of a motion to dissolve, and affidavits to sustain it, if made in good faith, although in fact the motion be not passed upon by the court and the injunction only dissolved upon final hearing. *Wallace et al. v. York et al.*, 81.
2. **TAXATION.** A court of equity has jurisdiction to restrain by injunction the collection of a tax which has been certified by mistake by the clerk to have been voted, when in fact the proposition for the levy of the tax was defeated. *Cattell v. Lowry et al.*, 478.
3. **PLEADING: MATTER IN AVOIDANCE.** Where the equity of the petition is admitted or not denied and the answer sets up new matter which amounts to a defense, such answer is not equivalent to a denial of plaintiffs' equities and the injunction should be continued to final hearing. *Fargo & Co. et al. v. Ames et al.*, 494.
4. ——: **QUESTIONS OF DOUBT.** Where it is apparent from the answer that there are still questions of doubt respecting which additional information is indispensable to a decision of the case, a dissolution should not be granted, especially when the relief was asked for the prevention of irreparable injury. *Id.*

See **RAILROADS**, 2.

INSANITY.

1. **PROOF OF: CONFESSION.** Upon the trial of an issue of insanity, all the facts connected with the personal history of the person alleged to be insane are competent evidence, and his own confession that for a long period, including the time in question, he had been of unsound mind, is admissible. *Ross v. McQuiston et al.*, 145.

2. ——: WILL. Another will than the one in controversy, executed when the testator was confessedly insane, is admissible to rebut the presumption of sanity arising from the form or character of the will offered for probate. *Id.*

See EVIDENCE, 4-7.

INSTRUCTIONS.

1. PERTINENCY TO EVIDENCE. Instructions should be based upon the evidence, and pertinent thereto. *The State v. Osborne*, 425.
2. WHEN MISLEADING. An instruction is erroneous, even if it embraces correct propositions of law, which has a tendency to mislead the jury by implying that other conditions than those involved in the evidence are necessary to the determination of the case. *Van Tuyl v. Quinton*, 459.

See CRIMINAL LAW, 13, 14.

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PRACTICE, 1, 10.

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INSURANCE.

1. WAIVER OF CONDITIONS OF POLICY: PRINCIPAL AND AGENT. Where a policy of insurance provides that the company shall not be liable until actual payment of the premium is made, and that no agent shall be held to have waived any condition of the policy unless the waiver be indorsed thereon in writing, it is, nevertheless, competent for an agent to bind the company by a parol agreement extending the time of payment of the premium, and, under such agreement, the assured may have a right of action against the company for a loss by fire. *Young & Co. v. The Hartford Fire Ins. Co.*, 377.
2. PROOF OF LOSS. The acceptance of the proofs of loss by the agent of the company, and the failure to object to them within a reasonable time, precludes it from afterward making objection, either to their form or substance. Any objections to the proofs should be made with reasonable promptitude, so that if they are imperfect they may be corrected. *Id.*
3. TITLE OF PROPERTY: MISSTATEMENTS OF AGENT. Any misstatements in the policy, respecting the title of the property insured, made by the agent, will not release the company from liability. *Id.*

See PRINCIPAL AND AGENT, 2.

INTOXICATING LIQUORS.

1. SALE TO MINORS: LIEN UPON THE PREMISES. A judgment for damages for the sale of intoxicating liquors to a minor, under section 1539 of the Code, will not be a lien upon the premises where the liquor is sold, if they are owned by a third party, unless he have knowledge of and assent to the unlawful act for which the judgment is recovered. *Cobleigh v. McBride et al.*, 116.

2. **FORFEITURE TO THE SCHOOL FUND: EVIDENCE.** While it might be proper to inquire into the situation of a witness with respect to the parties, yet it is not competent to inquire of the plaintiff in an action for the benefit of the school fund, under the above section, why he instituted the suit. *Id.*
3. **—: —.** Testimony that it was a matter of common report and public notoriety that intoxicating liquors were sold by the defendant was not admissible. *Id.*
4. **—: INSTRUCTION.** The jury were properly instructed that the recovery would be for the benefit of the school fund, and that the plaintiff had no interest therein. *Id.*
5. **—: CONSTRUCTION OF STATUTE.** Section 1539 applies not only to those having a permit to sell, but also to all persons who may sell intoxicating liquors to minors or to persons who are in the habit of becoming intoxicated. *Id.*

See CRIMINAL LAW, 17, 25.

NEW TRIAL, 7.

JUDGMENT.

1. **EQUITABLE JURISDICTION.** A court of equity will not interfere to restrain the collection of a judgment rendered upon a claim admitted to be due, on the ground that it was rendered without jurisdiction of the defendant and that the costs incurred were oppressive. *Parsons v. Nutting et al.*, 404.

See COUNTY AUDITOR, 2.

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PRACTICE IN THE SUPREME COURT, 14.

JUDGMENT BONDS.

1. **INNOCENT HOLDERS: NEGOTIABLE PAPER.** The judgment bonds of a county in the hands of innocent holders for value, without notice of their illegality for any cause, cannot be defeated by showing that the judgments were rendered upon warrants issued in excess of the constitutional limitation of five per cent, and that the board of supervisors fraudulently omitted to interpose the defense when the warrants were sued upon. BECK, J., dissenting. *The S. C. & St. P. R. Co. v. The County of Osceola et al.*, 168.

JUDICIAL SALE.

1. **REDEMPTION: MORTGAGE.** F. executed a mortgage upon realty to secure certain notes. He afterward sold the land to S. subject to the mortgage, and contracted with B. to protect him from personal liability upon the notes. The land was sold under a judgment against S., and the purchaser, K., received a sheriff's deed therefor. The mortgage was afterward foreclosed and K. also became the assignee of the sheriff's certificate of sale thereunder. The land failing to sell for the whole of the mortgage debt, B. became liable for, and paid the remainder, and brought an action to be allowed to redeem the land from the foreclosure

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sale: *Held*, that K., being the owner of the land under the former execution sale, was alone entitled to redeem, and that his purchase of the certificate of sale was in effect a redemption. *ROTHROCK*, J., dissenting. *Brooks v. Keister*, 303.

See CONVEYANCE, 6.

PRINCIPAL AND AGENT, 4, 5, 6.

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JURISDICTION.

1. ADMINISTRATOR: JUDGMENT. The probate court has jurisdiction to appoint an administrator, even in a county where there is no property of deceased beyond an interest in an action at law, and its adjudication is not open to collateral attack. *Murphy, Neal & Co. et al. v. Creighton*, 179.
2. ATTACHMENT. In an action by attachment in the Circuit Court, upon a note not yet due, the attachment is the subject matter of the action in such sense that an injunction will not be granted by the District Court restraining the defendant from making waste of the property attached. *Cooney v. Moroney et al.*, 292.

See ADMINISTRATOR, 1.

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JURY.

1. IMPEACHMENT OF VERDICT. Affidavits of jurors respecting the motives which induced an agreement to a verdict will not be received for the purpose of impeaching the same. *Brown v. Cole et al.*, 601.

See CRIMINAL LAW, 19.

NEW TRIAL, 4, 7.

LANDLORD AND TENANT.

1. MEANS OF ACCESS. Whoever takes a lease of land must ascertain at his peril whether or not the land is accessible, and the landlord is guilty of no fraud if he fail to apprise the tenant that there is no road communicating with the premises. *Handrahan v. O'Regan*, 298.
2. LEASE: RENT. Where land is leased upon condition that a third of the crop shall be given to the owner in payment of rent, the owner acquires no title to the part of the crop reserved for rent, until it is set apart for him by the tenant. *Townsend & Knapp v. Isenberger et al.*, 670.
3. ——: CONVEYANCE. Rent reserved by lease and not accrued passes with a conveyance, and a purchaser of the land at judicial sale becomes entitled thereto. *Id.*

4. ——: NOTICE. The fact that notice in an action of attachment against the realty was served by publication does not prevent the rent from passing with the land at judicial sale. *Id.*
5. ——: APPRAISEMENT. Nor will the purchaser's title be affected by a failure to appraise the rent prior to the sale. *Id.*

LIEN.

1. CHANGE OF. In exchanging one form of security for another for the same debt, no other lien can intervene and become paramount thereto. *Thorpe Brothers v. Durbon et al.*, 192.
2. MORTGAGE: MECHANIC'S LIEN. Where the vendee of real estate under a verbal agreement to purchase erected thereon a building to which a mechanic's lien attached, and subsequently thereto he received a deed and executed a mortgage for the purchase money, held, that the lien of the mortgage was paramount to the mechanic's lien. *Id.*
3. LIVERY STABLE KEEPER HAS NONE. A livery stable keeper has no lien for care and feeding upon a horse delivered to him for keeping, in the absence of a special agreement therefor. *McDonald & Co. v. Bennett*, 456.
4. CONSTRUCTION OF STATUTE. Such a lien is not conferred by section 2177 of the Code. *Id.*

See HOMESTEAD, 3.

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VENDOR'S LIEN.

MECHANIC'S LIEN.

1. PRIORITY: MORTGAGE. A mechanic's lien for materials furnished for the improvement or enlargement of a building does not take priority over an existing mortgage, and this rule prevails even though the building be changed so that very little of the original structure remains. *The Equitable Life Ins. Co. et al. v. Slye et al.*, 615.
2. EMBRACES WHOLE STRUCTURE. The party who furnishes material or machinery for a building by the filing of his lien acquires one upon the entire structure, and what he furnishes becomes in turn subject to all liens of his fellow mechanics which attached earlier. *Id.*
3. SUB-CONTRACTOR: AGENCY. Before the statement of his lien by a subcontractor can be given to the owner to establish his lien, either the contractor himself or his duly authorized agent must have refused to sign a statement of his claim. *Mears & Hays v. Stubbs & Co. et al.*, 675.

See LIEN, 2.

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See PRINCIPAL AND AGENT, 4, 5

MINOR.

1. RECOVERY FOR PERSONAL SERVICES: CONTRACT. Where a minor has rendered services in accordance with the terms of a contract entered into by himself and has received payment for the same, such payment is a full satisfaction for the services, and the minor cannot a second time recover therefor. *Murphy v. Johnson*, 57.

See INTOXICATING LIQUORS, 1.

SERVICES, 2.

MORTGAGE.

1. UPON CHATTELS: UNCERTAINTY OF DESCRIPTION. The description in a chattel mortgage should be so explicit as to enable third persons, aided by the inquiries which the instrument itself suggests, to identify the property covered thereby, and a mortgage mis-describing property will not affect the purchase of the same by a third party by imparting to him notice of the incumbrance. *Irvine v. Hines*, 73.
2. CANNOT BE EXTENDED. The security of a mortgage cannot be extended to embrace debts of the mortgagor to the mortgagee not provided for in the instrument itself. *Savage v. Scott et al.*, 130.
3. ATTORNEY'S FEES: LIABILITY OF PURCHASER. The purchaser of land subject to a mortgage, who undertakes to discharge the mortgage, becomes personally liable upon a covenant in the mortgage that a reasonable attorney's fee shall be paid if the mortgage is foreclosed. *Johnson v. Harder and Avery*, 677.

See HOMESTEAD, 5.

JUDICIAL SALE, 1.

LIEN, 2.

MECHANIC'S LIEN, 1.

PARTNERSHIP, 1-4.

PRACTICE, 20.

PROMISSORY NOTE, 4.

VENDOR'S LIEN, 4.

MUNICIPAL CORPORATIONS.

1. MANDATORY ORDINANCE: JURISDICTION. It is competent for a city to prescribe by ordinance the manner in which jurisdiction may be acquired over particular subjects, and if the requirements of the ordinance are mandatory, an act of the city without acquiring jurisdiction in the manner prescribed is void. *Starr v. The City of Burlington*, 87.
2. ——: IMPROVEMENT OF STREETS. An ordinance directing that improvements in streets shall be ordered by resolution describing the streets and improvements, and that notice shall be given by the publication of the resolution, is not directory but mandatory. *Id.*
3. ——: ——. The receipt and reference to the proper committee of a petition asking that the improvements be made, a resolution directing the committee to advertise for and receive bids, and another resolution

directing them to contract with the lowest bidders for the performance, did not constitute a compliance with such an ordinance and did not confer upon the city jurisdiction to make the improvement and subject an adjacent property holder to liability therefor. *Id.*

4. ——: ESTOPPEL. The proceedings for the levy of the assessment being without jurisdiction and void, the property holder is not estopped to deny their validity by the fact that he made no objection while the improvement was in progress. *Id.*
5. RECOVERY FOR IMPROVEMENTS: SPECIAL CHARTERS. Prior to the taking effect of the Code, a city organized under a special charter could not recover from the owners of lots the cost of improvements of adjacent streets, notwithstanding any irregularity or defect in the proceedings under which the work was ordered. *Id.*
6. IMPROVEMENT OF STREETS: SCOPE OF STATUTE. The proceedings under which the improvement was ordered having taken place and the contract for the work been made prior to the time when the Code took effect, they will be governed by the statute then existing, and the provisions of the Code will not apply. *Id.*
7. WHARFAGE: REASONABLE COMPENSATION. Under the charter of a city providing that the city "shall have control of the landings of the Mississippi river, and the right to build wharves and regulate the landing, wharfage and dockage of boats," it may establish and construct wharves and collect a reasonable compensation for their use. *The City of Muscatine v. The Keokuk Northern Line Packet Company*, 185.
8. ——: MUST BE FIXED BY ORDINANCE. The erection of a wharf by a city must be presumed to be for the use and benefit of the public, and in the absence of any ordinance fixing the wharfage dues or providing for the payment of a compensation for the use of its wharves, such compensation cannot be collected by the city. *Id.*
9. ——: VOLUNTARY PAYMENT. Where the owners of boats have paid wharfage fees under protest, which were demanded and collected in the absence of authority to make the demand, they cannot recover them back in an action against the city. *Id.*
10. ——: ——. The mere danger that an action at law will be commenced to enforce payment, does not make the payment of a demand unjustly and illegally made a compulsory payment. *Id.*
11. WHARF: WHAT CONSTITUTES. Upon a non-tidal stream, any construction of timber or stone upon the bank, of such shape that a vessel may lie alongside of it with its broadside to the shore, constitutes a wharf, and a paved street extending to the water's edge and used by vessels as a place for receiving and discharging freight and passengers may be so designated. *The City of Keokuk v. The Keokuk Northern Line Packet Company*, 196.
12. ——: WHARFAGE FEES. A city may prescribe by ordinance the fees which shall be paid for the use of the wharves within its limits, and this power is subject only to the limitation that such fees shall be reasonable. *Id.*
13. ——: ——. Wharfage fees thus levied do not constitute a tax, but are to be regarded simply as compensation exacted for the use of the wharves. *Id.*
14. ——: ——. In the exercise of their police powers cities may control the landing of boats, designating the places at which they shall receive and discharge freight and passengers, and collecting a reasonable compensation for wharfage. SEEVERS, CH. J., dissenting. *Id.*

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15. **WHARFAGE FEES: CONSTITUTIONAL LAW.** An ordinance requiring the payment of wharfage fees is not unconstitutional, even though it exacts payment from vessels when they are moored at places where no wharves have been provided.

Argument 1. The city may control the landing of vessels and fix the places where they may receive and discharge freight and passengers.

Argument 2. Even conceding that part of the ordinance to be unconstitutional which authorizes the collection of wharfage fees from vessels that do not land at wharves, the remainder of the ordinance would not for that reason be void. SEEVERS, CH. J., dissenting. *Id.*

16. ——: TONNAGE DUTY. The fact that the wharfage fee is graduated by the tonnage of the vessel does not constitute a duty on tonnage, within the meaning of the Constitution of the United States forbidding the levying of such an impost. *Id.*

See **DAMAGES**, 9.

EVIDENCE, 24.

GARNISHMENT, 3, 4.

RAILROADS, 12.

TAXATION, 10.

NEGLIGENCE.

1. **LIABILITY FOR: CONTRIBUTORY NEGLIGENCE.** The plaintiff's negligence will not enable the defendant to escape liability if the act which caused the injury was done by the defendant after he discovered the plaintiff's negligence, and if the defendant could have avoided the injury by the exercise of reasonable care. *Morris v. The C., B. & Q. R. Co.*, 29.

2. **DOMESTIC ANIMALS RUNNING AT LARGE: RAILROADS.** A railway company is released from the duty of exercising ordinary care toward a domestic animal required to be kept in an inclosure, which may have strayed upon its track, only when the animal is at large by the owner's sufferance. *Pearson v. The Milwaukee & St. Paul R. Co.*, 497.

3. **BURDEN OF PROOF: RAILROAD.** In an action by an administrator for causing the death of a person, the plaintiff must prove that the decedent was not guilty of negligence contributing to his death. *Murphy v. The C., R. I. & P. R. Co.*, 661.

4. ——: ——. The proof of the fact that decedent, at the time of the accident, was in the exercise of ordinary care, need not always be direct and positive, but the fact may sometimes be fairly and reasonably inferred from the circumstances. *Id.*

See **DAMAGES**, 8.

EVIDENCE, 24.

RAILROADS, 3, 15.

NEW TRIAL.

1. **NEWLY DISCOVERED EVIDENCE.** A new trial will not be granted on the ground of newly discovered evidence, where the matter to which the evidence relates was distinctly put in issue in the pleadings, and the application fails to disclose the exercise of reasonable diligence to obtain the evidence. *Carman v. Roennan*, 135.

2. ——. Where the application for a new trial on the ground of newly discovered evidence shows that the evidence is material and not cumulative, and that reasonable diligence was exercised to discover it, the new trial should be granted. *Way v. The B., C. R. & M. R. Co.*, 217.
3. **CUMULATIVE EVIDENCE.** The admission of a party is not evidence of the same kind as the testimony of other witnesses, and, therefore, is not cumulative, although relating to the same controverted fact. *Id.*
4. **CONDUCT OF JURY: PRACTICE.** That one of the jurors left the room where the jury were considering the case for a proper purpose, in the care of the deputy sheriff with whom he had no conversation about the case, did not justify the granting of a new trial. *The State v. Bowman*, 418.
5. **NEWLY DISCOVERED EVIDENCE.** A new trial should not be granted on the ground of newly discovered evidence, unless the application be accompanied by a showing of diligence to procure it upon the trial and unless, also, it appear to the satisfaction of the court that a different result might probably be expected if the application is granted and the case tried again. *Id.*
6. ——: **CRIMINAL LAW.** The statutes of this State do not authorize the granting of a new trial in a criminal case on the ground of newly discovered evidence. *Id.*
7. **MISCONDUCT OF JUROR: INTOXICATING LIQUORS.** Where a juror, pending the trial, took a small quantity of intoxicating liquors for medicinal purposes at night, it was held that this did not constitute a ground for the granting of a new trial. *O'Neill v. The Keokuk & Des Moines R. Co.*, 546.

NOTICE.

See **HOMESTEAD**, 5.

LANDLORD AND TENANT, 4.

VENDOR AND VENDEE, 5.

NUISANCE.

See **DAMAGES**, 7-9.

PARTIES.

1. **ASSIGNMENT OF CONTRACT: PRACTICE.** To an action for canceling the assignment of a contract, alleged to be fraudulent, both the assignor and the assignee are necessary parties, and either may insist, either upon the trial below or upon the trial *de novo* in the Supreme Court, that a decree shall not be rendered against him until the other is brought into court. *Miller et al. v. Mahaffy et al.*, 289.

See **PARTITION**, 2.

PLEADING, 4.

RAILROADS, 1.

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PARTNERSHIP.

1. **MORTGAGE.** Where property belonging to a firm is mortgaged to secure a note executed in the firm name, a partner has a right to insist upon a foreclosure of the mortgage before a personal judgment can be rendered against him upon the note. *Warren v. Hayzlett*, 235.
2. ——: **PRIORITY OF LIEN.** In case the party shall pay the note executed by the firm he then becomes subrogated to the rights of the mortgagee and his lien will be prior to that of a mortgage executed upon the same property by a grantee of the firm. *Id.*
3. **LIABILITY OF PROPERTY FOR FIRM DEBTS: ATTACHMENT.** An attachment of partnership property for a partnership debt will prevail over a prior attachment of the same property for a separate debt of one of the partners, or over a mortgage of one of the partners to secure his individual indebtedness. *Fargo & Co. v. Ames et ux.*, 491.
4. **MORTGAGE BY PARTNER.** A mortgage upon the firm property by a partner to secure his separate debt covers the entire joint property, subject to the claims of his co-partners therein, and if he secures the release of these claims the lien of the mortgage becomes absolute upon the whole property. *Id.*

PARTITION.

1. **SALE OF COMMON PROPERTY: JURISDICTION.** Where property owned in common cannot be equitably divided, it is competent for the court to direct, in an action for partition, that the common property be sold and the proceeds divided. *Metcalf and Simpson v. Hoopingardner*, 510.
2. **TENANT IN COMMON: PARTIES.** Where one of the tenants in common had covenanted to keep the property in repair, the allegation that he has been guilty of a breach should be tried in the action for partition, and the holder of a judgment against one of the tenants in common should be made a party to the action. *Id.*

PAYMENT.

1. **WHEN MADE VOLUNTARILY: RECOVERY.** If a party with full knowledge of all the facts in the case voluntarily pays money in satisfaction or discharge of a demand unjustly made upon him, he cannot afterward allege such payment to have been made by compulsion and recover back the money. *Murphy, Neal & Co. et al. v. Creighton*, 179.

See CONVEYANCE, 4.

PROMISSORY NOTE, 2, 3.

TAX SALE AND DEED, 4.

PLEADING.

1. **AMENDMENT.** An amended petition is not a substitute for the petition first filed, and the averments of the latter, in so far as they are not modified or withdrawn by the amended pleading, will stand. *The State v. Finn*, 148.
2. **REPLY.** A reply is unnecessary where the answer does not set up a counter-claim and the plaintiff has no matter to plead in avoidance of the allegations of the answer. *Davis v. Payne and Shadduck*, 194.

3. DEMURRER. A failure to demur will not deprive the appellant of the right to urge a legal objection to the judgment, when the fact upon which the objection was based was not pleaded. *Johns v. Bailey et al.*, 241.
4. JOINDER OF CAUSES OF ACTION: PARTIES. Two parties cannot be joined as defendants in one action where a recovery is sought against one of them upon a written contract and against both upon an oral agreement. *Addicken v. Schrubbe*, 315.
5. CAUSE OF ACTION: STATEMENT OF. Under the Code the same cause of action may be stated in different counts of the petition, and, while a statement therein that the counts relate to the same cause of action is unnecessary, yet it will not vitiate the pleading. *Pearson v. The Milwaukee & St. Paul R. Co.*, 497.

See EVIDENCE, 11.

INJUNCTION, 3, 4.

PRACTICE, 4, 5, 19, 22, 25.

WILL, 7.

PRACTICE.

1. INSTRUCTIONS: APPEAL. If under no possible view of the case the instructions given or refused can be correct, the Supreme Court will review the action of the court below with respect thereto, even if the record does not properly present the evidence offered upon the trial. *Murphy v. Johnson*, 57.
2. TRIAL: APPEAL. An equity cause is triable in the Supreme Court upon the errors assigned, notwithstanding no motion may have been made in the court below for a trial upon written evidence. *Jordan v. Wimer et al.*, 65.
3. FINDING OF COURT. In all actions and special proceedings not triable *de novo* in the Supreme Court, the finding of the court stands as the verdict of a jury, and will not be set aside if there is any evidence by which it can be supported. *Sisters of Visitation et al. v. Glass et al.*, 154.
4. PLEADING: DEMURRER. Where leave has been granted for an extension of time in which to file an answer, it is within the discretion of the court to permit a demurrer to be filed, and the action of the court will not be reversed unless it be shown that there was prejudicial error in the ruling. *Gray v. Myers*, 158.
5. ——. Where a petition is not assailed by motion, demurrer, or in arrest, an objection which might have been made in either of those methods, but was not, will be deemed to have been waived. *Murphy, Neal & Co. et al. v. Creighton*, 179.
6. APPEARANCE: FAILURE TO MAKE. A party is not excused for failure to make appearance before a referee to whom the cause has been referred, after being served with notice, by the fact that he or his attorneys have been induced to believe that no trial would take place at the time designated in the notice. *Washington County v. Jones*, 260.
7. TRIAL BEFORE REFEREE. The report of a referee may be assailed by a motion to set it aside or by proper exceptions thereto, filed upon the coming in of the report, and it is not essential that exceptions be taken to errors occurring on the trial before him, if such errors appear of record. *Id.*

8. QUESTIONS ON APPEAL. In an action at law questions must be raised in the court below to entitle them to a hearing in the Supreme Court. *Trayer v. Reeder*, 272.
9. ADMINISTRATOR: ALLOWANCE BY. The court may set aside or modify an allowance of a claim against an estate, approved by the administrator and allowed by the clerk in vacation, without any evidence except what may be shown by the papers. *Ordway & Husted v. Phelps*, 279.
10. INSTRUCTIONS: APPLICABILITY TO EVIDENCE. The giving of instructions which contain correct propositions of law but which are not applicable to the evidence, and the failure to instruct the jury how to apply the evidence given in the case, constitute error justifying a reversal. *The State v. Thompson*, 414.
11. REFERENCE OF CAUSES. It is the general rule in this State that all actions may be referred by consent, and chancery cases, wherein questions of fact arise, without consent. *Hobart v. Hobart*, 501.
12. DIVORCE: REFEREE. Actions for divorce, however, are excepted from the operation of this rule by section 2222 of the Code, and such actions cannot be sent to a referee for a hearing, but must be publicly tried in open court, by the courts themselves. *Id.*
13. ——: CONSENT OF PARTIES. Consent of the parties to an action for divorce will not authorize the court to refer the case. *Id.*
14. ——: REFEREE. The fact that the report of the referee is filed with the court, and exceptions thereto are heard and ruled upon, does not constitute a trial in open court within the meaning of the statute. *Id.*
15. ——: ——. Nor does the adoption of the findings of the referee by the court constitute a compliance with the requirements of the statute. *Id.*
16. ——: COMMISSIONER. The referee is not merely a commissioner to take the evidence, such as may be appointed under section 2222 of the Code. *Id.*
17. ——: ——. But, where an action for divorce has been tried by a referee it was held that the evidence taken before him might be used upon a re-trial of the case. *Id.*
18. ——: TRIAL DE NOVO. The fact that such an action is triable *de novo* in the Supreme Court, and that all the evidence is before it, in an action which has been tried before a referee, does not obviate the necessity for a reversal and re-trial in the manner provided by statute. *Id.*
19. DEMURRER. Where the parties have recognized in a stipulation the fact that a demurrer has been tendered, they cannot afterwards object that the demurrer should not be considered because it is not in proper form. *Updegraff v. Edwards et al.*, 513.
20. JOINDER OF PARTIES: MORTGAGE. In an action to quiet title to distinct parcels of land, mortgagees of the land may properly ask to be made parties, and by cross-petition may seek a decree of foreclosure, and the grantees of a purchaser at a subsequent tax sale alleged to be fraudulent may also be joined and the validity of the tax sale determined therein. *Switz v. Black et al.*, 597.
21. TRIAL: CERTIFICATE OF CLERK. Where a cause was ordered to be tried upon written evidence, it will be presumed to have been so tried, in the absence of a bill of exceptions or other statement signed by the judge, and this presumption will not be rebutted by a certificate of the clerk that the trial was upon oral as well as written evidence. *Ryan & Co. v. Mullinix et al.*, 631.

22. DEFECT OF PARTIES: WAIVER. If the objection that one who is a necessary party is not joined in the action be not raised by demurrer, it will be deemed to have been waived. *Id.*
23. WHEN COURT MAY DIRECT VERDICT. The court cannot take a case from the jury if there is any conflict in the evidence, and only has the power to do so when a party offers no evidence, or all the proof on both sides points in the same direction. *Powers v. The City of Council Bluffs*, 652.
24. COURT MAY DIRECT VERDICT. Whenever any of the essential and integral elements are wholly without proof, the court may properly refuse to allow the case to go to the jury. *Murphy v. The C. R. I. & P. R. Co.*, 661.
25. CHANGE OF VENUE: PLEADING. A change of venue, pending the filing of an answer, takes from the plaintiff the right to file a motion for default, after the time to plead has expired, in the court where the action was commenced. *Wormley v. The Dist. Township of Carroll*, 666.

See CRIMINAL LAW, 1, 13, 19.

EVIDENCE, 2, 10, 13.

GARNISHMENT, 4.

NEW TRIAL, 4.

PARTIES, 1.

TENDER, 1.

WILL, 1, 5, 6.

PRACTICE IN THE SUPREME COURT.

1. ASSIGNMENT OF ERRORS. An assignment of errors should point out the very error objected to, and one which stated that "a new trial should have been given for the reasons set forth in the motion," was held not to be sufficiently specific. *Morris v. The C. B. & Q. R. Co.*, 29.
2. ABSTRACT: EVIDENCE. Where the appellee has filed an amended abstract, which contained evidence alleged to have been omitted in the abstract submitted by appellant, he will not be permitted to maintain that all the evidence in the case is not before the court. *Starr v. The City of Burlington*, 87.
3. VERDICT: EVIDENCE. A finding of fact by the court below does not require a preponderance of evidence to sustain it on appeal, but it will not be disturbed if it is supported by any evidence, and is not the result of passion or prejudice. *Ross v. McQuiston et al.*, 145.
4. TRIAL DE NOVO. To entitle a party to trial *de novo* in the Supreme Court, he must move upon the trial in the court below that all the evidence be taken down in writing. *Richards et al. v. Hintrager*, 253.
5. ——: CONSTITUTIONAL LAW. While the right to a trial *de novo* cannot be taken away by legislative action, yet it is competent for the legislature to regulate the manner in which the right shall be exercised. *Id.*
6. ——: BILL OF EXCEPTIONS. Where the evidence is not preserved by bill of exceptions, and no exceptions to the judgment are taken, in a case not triable *de novo* in the Supreme Court, there is nothing presented upon which the court can review the decision of the court below, or determine that the appellee is not entitled to the relief granted. *Id.*

7. **ADMISSION OF EVIDENCE.** The rulings of the court below upon the admission of evidence will be reviewed by the Supreme Court if prejudice therefrom affirmatively appears, even though the record does not contain all the evidence in the case. *Smith v. Johnson et al.*, 308.
8. ——: **ERROR WITHOUT PREJUDICE.** The admission of incompetent evidence will not be held to be error without prejudice where such evidence constitutes the whole of the proof of the party offering it, or adds to the weight of testimony in his behalf. *Id.*
9. **TIME FOR FILING BILL OF EXCEPTIONS.** Where time is allowed beyond the term for settling a bill of exceptions, upon failure to file it within the time designated it will be stricken from the files upon motion. *Parmenter v. Elliott et al.*, 317.
10. **INTERLINEATION IN ABSTRACT.** Where there is a written interlineation in the petition set out in the printed abstract, without which the finding of the court below could not be sustained, it will be presumed, in the absence of any showing to the contrary, that the abstract as amended is correct. *Mahaska County v. Ruan et al.*, 328.
11. **TRIAL DE NOVO.** Where no motion was made in the court below to have the case tried on written evidence, and the evidence is not certified by the trial judge, the case will not be tried *de novo* in the Supreme Court. *Altman & Co. v. Farrington et al.*, 620.
12. **FINDING OF FACT: EVIDENCE.** A finding of fact will not be disturbed because not sustained by the evidence, when there is evidence tending to support it. *Id.*
13. **MOTION TO STRIKE BILL OF EXCEPTIONS.** A motion will not lie to strike the bill of exceptions on the ground that it does not correctly present the evidence. *Hughes v. Stanley*, 622.
14. **EVIDENCE: JUDGMENT.** The Supreme Court will not inquire whether or not the judgment is sustained by the evidence, unless it shall appear, either by the certificate of the trial judge or the agreement of the parties, that all the evidence in the case is presented on appeal. *Wormley v. The District Township of Carroll*, 666.

See **EVIDENCE**, 12.

PRINCIPAL AND AGENT.

1. **CONDITIONAL SALE.** A party who is authorized to sell goods for another, under a written contract not recorded, and is bound by the terms thereof to turn over the proceeds, whether in cash or notes, to his principal, and after a certain specified date to become liable for the payment of any unsold goods remaining in his possession, does not prior to that date hold the goods under a conditional sale, nor can a purchaser insist upon an off-set of any claim he may hold against the agent. *Conable v. Lynch*, 84.
2. **UNDISCLOSED PRINCIPAL: INSURANCE.** Where a party applied to the agent of an insurance company for insurance, and the agent agreed to write a policy, but nothing was said by either party respecting the company in which the insurance should be effected, and the policy was afterwards written by the agent, *held*, that the agency of the latter was not affected by the fact that the principal was undisclosed. *Young & Co. v. The Hartford Fire Ins. Co.*, 377.
3. **LEASE: RATIFICATION OF.** Where one who was in the employ of a mining company in a subordinate capacity leased the right to mine in a cer-

tain range to a party who paid rent therefor to the company, and the company received the same without objection, its conduct was held to amount to a ratification of the unauthorized act of its agent. *Chamberlain v. Collinson et al.*, 429.

4. **JUDICIAL SALE: MINES AND MINING.** Where the leased property was sold on execution, pending the lease, the execution purchaser was charged with constructive notice of the lessee's possession unless the latter had ceased to work the premises in a miner-like way. *Id.*
5. ——: ——. An application by the lessee to the purchaser, after threats by the latter that he would be disturbed in his possession, for permission to work a part of the range covered by his lease, will not deprive the lessee of the right to work all of the range embraced in his original contract with the lessor. *Id.*
6. ——: **MEASURE OF DAMAGES.** The execution purchaser having mined a part of the range embraced in the lease, the lessor is entitled to recover from him the value of the mineral he has taken out, with interest thereon from the time when the mineral was mined and sold, diminished by the amount of the rent due under the lease and the reasonable cost of mining. *Id.*
7. **AUTHORITY OF AGENT.** Authority given by a principal to an agent to invest his money, and look after his business generally, will not enable the agent to sell his principal's property, even such as may be acquired as the result of the investment. *Smith et al. v. Stephenson et al.*, 645.
8. **TAX PURCHASE.** Where one is buying at a tax sale for himself, and is also acting in some purchases as the agent of another, it will be presumed that the purchases made in his own name, and upon which he takes the certificates, are not made for his principal but for himself. *Id.*

See **COMMON CARRIER**, 1.

INSURANCE, 2, 3.

VENDOR AND VENDEE, 2, 3.

PROMISSORY NOTES.

1. **WHEN HELD AS COLLATERAL: INDORSEMENT.** Where a promissory note had been transferred by indorsement as collateral security, and then, before maturity, with the knowledge of the indorsee, the payee had sold it to a third party, into whose possession it did not come until after maturity, *held*, that the latter acquired it free from equities, and occupied the position of a good faith indorsee before maturity. *Grimm v. Warner et al.*, 106.
2. **PAYMENT: INSTRUCTION.** In an action upon a promissory note alleged to have been purchased by the defendant for the plaintiff's intestate, with money furnished by the latter, wherein defendant pleaded payment, it is proper to submit to the jury the question whether the transaction constituted a payment or a purchase of the note. *Dougherty v. Deeney et al.*, 443.
3. **PRESUMPTION OF PAYMENT.** While the mere delivery of money by the payer to the holder of a note is presumptive evidence of payment, yet this presumption may be rebutted by circumstances. *Id.*
4. **INDORSEMENT: MORTGAGE.** The transfer of a note by indorsement carries with it the mortgage and frees the mortgage in the hands of a good faith holder, like the note, of any equities between the original parties. *Updegraff v. Edwards et al.*, 513.

5. RECEIPT: BURDEN OF PROOF. Where in an action upon a promissory note the defendant introduces in evidence a receipt, the execution of which is admitted, the defendant may then rest, and the burden of explaining the receipt rests upon the plaintiff. *Williamson v. Reddish*, 550.

6. ——: ——. Where the plaintiff insisted that, notwithstanding the receipt, there was still due upon the note an unpaid balance, he had the burden of showing that fact and it was error to instruct the jury that the defendant was required after the introduction of the receipt to show that payment had been made of the entire amount due on the note. *ADAMS and BECK, JJ.*, dissenting. *Id.*

See ADMINISTRATOR, 1.

EVIDENCE, 8.

RECEIPT, 1.

SURETY, 1.

PUBLIC OFFICER.

See CLERK OF THE COURT.

COUNTY AUDITOR.

EXECUTION, 1, 2.

HIGHWAY, 7, 9.

SERVICES, 1.

TAX SALE AND DEED, 1, 2.

RAILROADS.

1. FOREIGN CORPORATION: RIGHT OF WAY. A foreign corporation has no power to acquire or possess land for right of way in this State, and cannot therefore be made a party to a proceeding for the assessment of damages for land appropriated for that purpose. *Holbert v. St. L., K. C. & N. R. Co.*, 23.

2. ——: ——: INJUNCTION. Where a foreign corporation is using by sufferance the line of a domestic corporation, a land owner is entitled to an injunction restraining it from the use of that portion of the line running through his land until he shall have been compensated for the appropriation of the same for right of way. *Id.*

3. HAND CAR: NEGLIGENCE. It is not necessarily negligence to run a hand car over a railway when a train is past due, even though more than ordinary danger is incurred thereby. The measure of care required must be estimated with a view to the safety of the employes operating the hand car, and of the passengers upon the train, and determined by the facts of each particular case. *Campbell v. The C., R. I. & P. R. Co.*, 76.

4. WHAT CONSTITUTES A TRANSFER. The term "transfer," as employed in section 1310 of the Code, refers to the act of removing freight, passengers and express matter, and is intended to cover the removal of cars, with their burdens, from one road to another, as well as the change of their burdens from the cars of one company to those of another. *The City of Council Bluffs v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 338.

5. CONSTITUTIONAL LAW: REGULATION OF COMMERCE. Any regulation of the transportation of goods from one State to another, upon railroads, operates as a regulation of commerce, and a statute prescribing such a regulation is unconstitutional and void. *Id.*
6. ——: ——. Section 1310-1316, inclusive, of the Code, requiring railway companies connecting with the Union Pacific Railway to transfer their freight, passengers and express matter at Council Bluffs, is in conflict with the Acts of Congress, approved, respectively, July 1, 1862, and June 15, 1866, and cannot, therefore, be enforced. BECK, J., dissenting. *Id.*
7. ——: AUTHORITY OF STATE. While the State may regulate the time or manner of making transfers of the subjects of commerce transported by railway carriage, between points within its own limits, it cannot impose any burden upon transportation between points lying in different States. BECK, J., dissenting. *Id.*
8. OCCUPATION OF STREET: CONTRACT. Since a railway company has the right to occupy the streets of a city with its track, without the consent of the municipal authorities, the city cannot impose conditions upon the railway company by an ordinance granting the right of way, which shall be binding upon the company upon its use of the street and create an obligation for the performance of the conditions. *Id.*
9. DAMAGES: EVIDENCE. In an action by an adjacent owner against a railway company for damages for the occupation of a street, whereby access to his property is obstructed and its value depreciated, the deed of right of way by the owner is admissible in evidence. *Frith v. The City of Dubuque and the C. D. & M. R. Co.*, 406.
10. ——: OCCUPATION OF STREET. The fact that a city has granted a railway a right to lay its track upon one of its streets does not deprive the owner of adjacent property of the right to maintain an action therefor, if he has suffered special injury not common to the general public. *Id.*
11. ——: MEASURE OF. The plaintiff in such an action is entitled to recover such special damages as he may have suffered from the time the street was obstructed until the commencement of his action. *Id.*
12. OCCUPATION OF STREET: LIABILITY OF CITIES. The city which has granted the railway company the right to use its street does not thereby become liable for its obstruction to the adjacent owner. *Id.*
13. RATE OF SPEED IN DEPOT GROUNDS: STOCK. Under section 1239 of the Code, railway companies are liable for all stock killed on depot grounds, by trains running at a rate of speed greater than eight miles an hour. *Monahan v. The K. & D. M. R. Co.*, 523.
14. ——: CONSTRUCTION OF STATUTE. The statute above cited imposes no restriction upon the rate of speed of trains outside of the limits of depot grounds, and the liability of a railway company for stock killed just beyond the limits is not affected by the fact that its train was running faster than eight miles an hour. *Id.*
15. CONTRIBUTORY NEGLIGENCE. The employee of a railway company who voluntarily leaves his post and is injured while upon another part of the train where the exposure is greater, is guilty of negligence contributing to the injury, and cannot recover therefor. *O'Neill v. The K. & D. M. R. Co.*, 546.

16. **THREAT TO EJECT PASSENGER: PUNITIVE DAMAGES.** A mere threat by a conductor to eject a passenger from a train unless the passenger shall pay a small amount in addition to the regular fare because unprovided with a ticket, even though he had tried to procure the ticket and found the ticket office closed, does not entitle him to punitive damages. *Paine v. The C., R. I. & P. R. Co.*, 569.

17. ——: **MEASURE OF DAMAGES.** In such a case, where no malice or wantonness appeared on the part of the conductor, the passenger would be entitled to recover the amount paid in excess of the regular fare, with interest. *Id.*

See CONTRACT, 5.

EVIDENCE, 3, 22.

HIGHWAY, 6.

NEGLIGENCE, 2, 3, 4.

TAXATION, 1, 12-14.

RECEIPT.

1. **WHAT IS: LOST NOTE.** An instrument given by the payee of a lost note, upon the execution of another note in its stead by the maker, stipulating that if the lost note comes to hand it shall be null and void, is a receipt and may be contradicted or explained by parol evidence. *Williamson v. Reddish*, 550.

See PROMISSORY NOTES, 5, 6.

RECEIVER.

1. **IRREGULARITIES OF: JURISDICTION.** Any irregularities in the proceedings of a receiver can be corrected only by the court which appointed him, and his conduct will not be reviewed in an action in another forum. *Stewart v. Lay*, 604.

See CORPORATION, 3.

REDEMPTION.

1. **JUNIOR LIEN: EVIDENCE.** P. recovered a judgment against Q. for the purchase money of the latter's homestead, and purchased the property at execution sale for less than the amount of his debt. F. also recovered judgment against Q. after the date of P.'s judgment upon a claim alleged to antedate the purchase of the homestead: *Held*,

1. That F. could show *aliunde* that the debt was contracted before the acquisition of the homestead.
2. That he was entitled to redeem from P.'s purchase upon payment of the amount of his bid. *Phelps v. Finn*, 447.

See JUDICIAL SALE, 1.

TAX SALE AND DEED, 8.

RES ADJUDICATA.

See DOWER, 1.

SCHOOLS.

1. SCHOLARS OVER THE SCHOOL AGE. If a person who has attained his majority voluntarily attends school, creating the relation of teacher and pupil, he thereby waives any privilege which his age confers and subjects himself to like discipline with those who are within the school age. *The State v. Mizner*, 248.
2. ——: PUNISHMENT. Such scholar may be punished for refractory conduct, and the teacher may escape liability therefor upon proof that the chastisement was under the circumstances reasonable. *Id.*

SCHOOL DISTRICT.

1. INDEPENDENT DISTRICT: ABANDONMENT OF ORGANIZATION. An independent district, embracing territory lying within the limits of two district townships, cannot be deprived of its territory save upon the concurrent action of the boards of directors of both the district townships; and when the organization of one of the townships has been abandoned, the territory lying within the limits of the other cannot be restored to it upon a vote to that effect by two thirds of the voters residing within the township. *The Ind. Dist. of Fairview v. Durland et al.*, 53.
2. ——: CONSTRUCTION OF STATUTE. Section 1798 of the Code provides for detaching territory only when both townships are organized as district townships, and each is governed by a board of directors whose jurisdiction extends over the entire township. *Id.*
3. ——: RE-DISTRICTING. Where a district township had been divided into independent districts, a vote of the electors re-districting the township did not have the effect to destroy the legal existence of an independent district lying partly within the township and partly within another, notwithstanding the directors of the latter had ordered the territory belonging to it to be restored. *Id.*
4. DIVISION OF TERRITORY: ASSETS. When a part of the territory of one school district is attached to that of another, the boards of directors of the two districts or arbitrators chosen by them shall apportion the assets upon the re-organization of the districts, and their jurisdiction for this purpose is exclusive. *The District Township of Viola v. The District Township of Audubon*, 104.
5. SUBDIVISION OF DISTRICT TOWNSHIP: APPORTIONMENT OF ASSETS. Upon the subdivision of a district township into independent districts, the directors of the district township are authorized to apportion the assets and liabilities, and it is only upon their failure to agree that the matters in dispute are to be referred to arbitrators. The consent of the various independent districts is not necessary to the jurisdiction of the district directors. *The Ind. School Dist. of Lowell v. The Ind. School Dist. of Duser*, 391.
6. JURISDICTION: ADJUDICATION. The adjudication of the directors of the district township in the apportionment of assets and liabilities is final and conclusive until set aside by proper proceedings, and cannot be attacked collaterally. *Id.*
7. ——: APPEAL TO COUNTY SUPERINTENDENT. An appeal will lie from their adjudication to the county superintendent, whose decision is binding upon the parties and may be enforced by action at law. *Id.*

See EVIDENCE, 25.

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1. PHYSICIAN: CORONER'S INQUEST. The coroner, or justice acting in his absence, is charged with the duty of fixing the compensation of a physician for performing autopsy upon the body of a deceased person under view, and his decision respecting the amount is in the nature of an adjudication, preventing the physician from maintaining an original action against the county for his services. *Cushman v. Washington County*, 255.
2. WHEN MINOR CANNOT RECOVER FOR: CONTRACT. A minor who resides in the family of a stranger in the character of a friend, dependent, or protege, in the absence of an express contract cannot recover for the services rendered the family during the period of such residence. *Smith v. Johnson et al.*, 308.

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1. WORDS ACTIONABLE PER SE. Words imputing to a married man a want of chastity are actionable *per se*. *Georgia v. Kepford*, 48.
2. LARCENY. The charge of larceny is substantiated by proof that one unlawfully appropriated the property of another, even though he afterward voluntarily surrendered it. *Id.*
3. CONFESSION: EVIDENCE. A confession of guilt by one who has been charged with a crime will not, in an action of slander, warrant the jury in finding, in justification of the charge, that the plaintiff had been guilty of the crime. *Id.*
4. INTERPRETATION OF WORDS. Words are to be construed in the sense in which, in the light of all the circumstances known to speaker and hearer, they are calculated to impress the hearer's mind and will be naturally understood. *Prime v. Eastwood*, 640.
5. EVIDENCE: QUO ANIMO. Evidence of other slanderous utterances than those charged in the petition is admissible for the purpose of showing malice. *Id.*
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a perfect title, and it subsequently appeared that the receiver could not give a good title until the determination of a suit in his favor some months afterward, it was held in an action by the receiver to compel specific performance, that the property being purchased for immediate use, the purchaser could not be compelled, after a delay of four months in perfecting the title, to execute the contract of purchase. *Parsons v. Gilbert, Hedge & Co.*, 33.

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STATUTE OF LIMITATIONS.

1. RESIDENCE: CITIZENSHIP. Residence and not citizenship is contemplated in the statute prescribing limitations upon the time of bringing actions, and the statute runs in favor of a debtor who has his domicile in the State. *Savage v. Scott et al.*, 130.
2. ——: DEMISE. The statute ceases to run when the debtor becomes a non-resident, but revives upon his demise. *Id.*
3. REVIVOR OF JUDGMENT. The revivor of a judgment by *scire facias* is simply a proceeding to enforce the judgment, and does not have the effect of a new judgment, with respect to the operation of the statute of limitations. The statute commences to run at the date of the original judgment. *Meek v. Meek*, 294.
4. CONSTITUTIONAL LAW. The statute of limitations pertains to the remedy, and not to the right of action or validity of the cause of action, and the States are not prevented by Art. IV, Sec. 1, of the Constitution of the United States, from enacting such statute barring actions upon judgments rendered in other States. *Id.*

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5. TAXES ERRONEOUSLY PAID. A cause of action for the recovery from the county of taxes illegally assessed, and paid in ignorance of that fact, accrues at the very moment of payment, and the action is barred after the lapse of five years from that time. *Callanan v. The County of Madison*, 561.

6. ——. It is not necessary that the tax be adjudged to be illegal before the cause of action shall accrue. *Id.*

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1. VACATION OF: BURDEN OF PROOF. In an action to enjoin the vacation of a street the plaintiff has the burden to establish the fact that he has rights which are abridged thereby. *Sawyer v. Meyer et al.*, 152.

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1. PROMISSORY NOTE: EVIDENCE. In an action upon a promissory note against a surety, the failure to object to the introduction of oral evidence showing that the surety requested the payee to sue upon the note, will not be deemed a waiver of the statutory requirement that such request should be in writing. *Davis v. Payne and Shadduck*, 194.

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1. APPROPRIATION OF FUND: SPECIAL ELECTION. It is competent for the board of supervisors to submit the question of the appropriation of the Swamp Land Fund to the electors at a special election. *Gray et al. v. Mount et al.*, 591.

2. ——: BOARD OF SUPERVISORS. The board of supervisors alone have authority to submit the proposition for appropriating the Swamp Land Fund to the erection of a county high school building at a certain place. *Id.*

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TAXATION.

1. ASSESSMENTS: RAILROADS. A road tax against a railroad company is not defeated by the fact that the assessment of the property is not placed upon the assessment book of the township. The order of the board of supervisors, declaring the length of the main track and assessed

value of the road lying within the township, transmitted to the trustees, becomes the basis for the levy of taxes upon railroad property. *The S. C. & St. P. R. Co. v. The County of Osceola et al.*, 168.

2. **IRREGULARITIES.** Mere irregularities in the levy of the tax will not defeat its collection. *Id.*
3. ——: **ROAD TAX.** That the taxpayer has not been notified to work out the part of the road tax which might be paid in work will not authorize the restraining of the collection of the entire tax. *Id.*
4. **SWAMP LANDS.** Lands granted by the United States to the counties as swamp lands are not subject to taxation so long as they are held and owned by the counties. *Sully v. Poorbaugh*, 453.
5. ——: **TIME OF CONVEYANCE.** Nor are they taxable for any year in which they may be conveyed by a county, if the assessment for that year be completed before the conveyance is made. *Id.*
6. **LIMITATION UPON: SCHOOL DISTRICT.** The board of supervisors are not authorized to levy a tax for the payment of a judgment against the school house fund of a district township, when the tax already levied for the use of that fund equals the maximum rate of ten mills on the dollar. *The Sterling School Furniture Co. v. Harvey et al.*, 466.
7. **ASSESSMENT: MANNER OF.** Where the assessor employed another to make the valuations of property, which were afterwards submitted to him for correction and approval, the assessment thus made was held not to be invalid. *Snell v. The City of Fort Dodge et al.*, 564.
8. ——: **LEVY.** An assessment upon the property in question having been made in 1869, and afterwards, during the same year, the town in which the property lay having become incorporated as a city, it was the duty of the auditor to base the levy for 1870 upon the assessment for 1869. *Id.*
9. **EQUALIZATION OF TAXES.** The books of assessment will be presumed, in the absence of a showing to the contrary, to be in possession of the board of equalization on the first Monday of May, when it is the duty of the taxpayer to appear if he has reason to complain of the assessment. *Id.*
10. **INTENT TO LEVY: MUNICIPAL CORPORATION.** Where a motion to "levy a tax of one per cent upon the taxable property" of a city was carried in its city council, and the clerk duly certified to the auditor that such a levy had been made, it was held, that the action of the council amounted to a present levy, and that the tax thereunder was a valid one. *Id.*
11. **EVIDENCE: LIMIT OF INDEBTEDNESS.** In an action upon the orders of a school district, defendant alleged that they were issued in excess of the constitutional limit of indebtedness; plaintiff offered to prove the value of certain lands upon the tax list, upon which the taxes were paid, but to which no valuation was assigned; Held, that the evidence should have been admitted. *Wormley v. The Dist. Township of Carroll*, 666.
12. **RAILROAD: NARROW GAUGE.** Where a tax had been voted to aid in the construction of a railroad, the fact that a narrow gauge road was constructed was held not to be a sufficient ground for restraining the collection of the tax. *Meader r. Lowry*, 684.
13. ——: **TRUSTEES.** After the construction of the road, the township trustees were guilty of no fraud in certifying to the fact that a railroad had been constructed, as contemplated in the notice of election. *Id.*

14. ——: ——. The certificate of the trustees was not invalidated by the fact that it was signed in a place outside of the township. *Id.*

See ELECTION, 1.

INJUNCTION, 2.

TAX SALE AND DEED.

1. **SALE: PURCHASE BY DEPUTY TREASURER.** The deputy of the county treasurer is prohibited from acquiring an interest in lands sold at tax sale, and where he entered upon the books a sale as made to a party who was not present, and who subsequently assigned the certificate to him, it was *held* to be invalid. *Ellis v. Peck et al.*, 112.
2. ——: WHEN VOIDABLE. Such a sale is not void but voidable only, and the fraud of the officer will not defeat the title based thereon, when held by a subsequent purchaser for value without notice, save upon proper proceedings instituted therefor. *Id.*
3. ——: LEVY: FRAUD. Where there has been no levy, the sale is absolutely void, and a good faith purchaser for value acquires no title thereunder, because this is a defect which the records of the county disclose, but where the assessment and other jurisdictional steps are regular, fraud may defeat the sale, but will not render it a nullity. *Id.*
4. ——: PAYMENT OF TAXES BY PURCHASER: RECOVERY FOR. Where the holder of a tax title adjudged to be invalid has paid taxes upon the land, while the patent owner remained in possession, he is entitled to recover therefor, and the measure of his recovery is the amount which the owner would have been compelled to pay the treasurer if the taxes remained unpaid. *Sexton v. Henderson et al.*, 160.
5. ——: LIEN OF CITY FOR TAXES. The deed of the county treasurer to realty sold for State and county taxes does not divest the property in the hands of the purchaser of the lien of the city for unpaid taxes. *Dennison v. The City of Keokuk*, 266.
6. ——: CITY TAXES: TAXES OF PRIOR YEARS. A sale for city taxes of one year does not divest the lien of the city for the unpaid taxes of prior years. *Id.*
7. ——: ——: PRIORITY OF LIEN. The lien of the tax purchaser is subject to the lien of the city for the taxes of prior years. *Id.*
8. ——: REDEMPTION FROM: DOUBLE SALE. A tract of land cannot be twice sold for taxes at the same sale, notwithstanding the taxes thereon may be delinquent for two different years, and the second sale being invalid the purchaser is not entitled to a deed, and redemption therefrom is unnecessary. *Shoemaker et al. v. Lacy*, 422.
9. **DEED: EFFECT OF.** A tax deed, regular upon its face, is conclusive evidence of the fact of a lawful sale. *Gould v. Thompson et al.*, 450.
10. ——: SECOND DEED. Where a deed does not conform in its recitals to the facts, the treasurer is authorized to execute a second and corrected deed, but he has no power to execute a second deed which shall misstate the facts respecting any proceedings prior to its execution, and such deed, if executed, would be void. *Id.*
11. **SALE: WHEN DEED IS SET ASIDE: RIGHTS OF OWNER.** When a tax deed is set aside on the ground that the lands were the property of the county at the time they were sold for taxes, the owner is not required to reimburse the purchaser for the amount he paid, and pay him in addition the interest and penalty. *Sully v. Poorbaugh*, 453.

12. ——: **ASSIGNMENT.** Where a tax purchaser assigned his certificate to another, the assignment not being recorded, and, after the expiration of three years from the time of sale, but before the execution of the deed, executed a quit claim deed to the owner of the property, *held* that the quit claim deed conveyed no title, and that the assignment of the certificate was valid. *Smith et al. v. Stephenson et al.*, 645.

See **PRINCIPAL AND AGENT**, 8.

TENANT IN COMMON, 2.

TENANT IN COMMON.

1. **ADVERSE POSSESSION: STATUTE OF LIMITATIONS.** The seizin and possession of one tenant in common are the seizin and possession of the others, and the statute of limitations will not operate in favor of the former to give him title by adverse possession unless it be sole and exclusive, with the knowledge and acquiescence of his co-tenants. *Burns v. Byrne et al.*, 285.

2. ——: **TAX SALE.** The husband of a tenant in common cannot acquire a valid title to the common property by purchase of the same at tax sale. *Id.*

3. **LIABILITY FOR RENT.** One tenant in common is not liable to his co-tenants for the use and occupancy of the common property in the absence of an agreement with them to pay rent, and of a demand from them to surrender possession, unless he has received rent for the property from a third person. *Reynolds v. Wilmeth*, 693.

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1. **CONTINUANCE OF.** The failure of a justice of the peace to pay to the clerk the sum tendered in a case appealed from the justice to the Circuit Court will not cause the tender to fail, at least until the party making the tender shall have had a reasonable time, after receiving notice of the non-payment, to procure an order upon the justice. *Waide v. Joy et al.*, 282.

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TRUST.

1. **EVIDENCE.** To establish a resulting trust in real estate, the evidence must be clear and satisfactory. *Burns v. Byrne et al.*, 285.

USURY.

1. **SALE OF GOLD.** A note and mortgage executed to secure a loan of gold at a higher rate of premium than the market value of the gold are usurious. *Austin v. Walker et al.*, 527.

2. ——: **RULE APPLIED.** A. loaned \$1,700 in gold to W., stipulating that, although the market value of gold was ten per cent premium, he should receive fifteen per cent, and the note and mortgage were executed in accordance therewith: *Held*, that the transaction was usurious. *Id.*

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1. **FRAUD: CONSIDERATION.** Inadequacy of consideration will not of itself establish fraud in procuring a conveyance of land, but may be considered with other circumstances. *Collar v. Ford*, 331.
2. **—: PRINCIPAL AND AGENT.** The fact that one was requested to ascertain and report to the owner, who lived in another State, the amount of taxes due on a piece of land, which he did, did not constitute him an agent with respect to the land so as to charge him with fraud in buying the same himself for less than its actual value. *Id.*
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4. LIMITED DEVISE: REMAINDER. Where a will devised a certain sum with the condition that it should be invested in real estate, the income of which should be enjoyed by the devisee during life with remainder to the heirs of her body, and the executor, in accordance therewith, conveyed to the devisee certain lands by a deed which recited the provisions of the will respecting the devise, *held*, that the devisee possessed only a conditional estate in the lands and could not convey them to a third party to the exclusion of her heirs. *Hanna v. Hauges et al.*, 437.
5. CONVEYANCE: PRACTICE. While an action to set aside a conveyance by the devisee would properly be brought in the name of the heirs, yet in an action therefor by their guardian, where they are minors, the court has the power to protect their interests and defeat the alienation of the property. *Id.*
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